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Tax Espresso

A snappy delight

April 2018

Greetings from Deloitte Malaysia Tax Services

Quick links: *Deloitte Malaysia*
Inland Revenue Board of Malaysia

Takeaways:

1. Tax Audit Framework 2018
2. Practice Note No. 1/2018
3. Keysight Technologies Sdn Bhd v KPHDN (High Court)
4. Magnum Holdings Sdn Bhd, Magnum Berhad v KPHDN (High Court)

Upcoming events:

1. *GST Academy - A series of practical and informative workshops*
2. *Deloitte International Tax Symposium 2018*

Important deadlines:

Task	2018 Due Date	
	30 April	1 May
1. 2019 tax estimates for companies with May year-end		√
2. 6th month revision of tax estimates for companies with October year-end	√	
3. 9th month revision of tax estimates for companies with July year-end	√	
4. Statutory filing of 2017 tax returns for companies with September year-end	√	
5. Due date for 2018 CbCR notification for companies with April year-end	√	

Tax Audit Framework 2018

The Inland Revenue Board of Malaysia (IRBM) has issued the Tax Audit Framework 2018 (currently only Bahasa Malaysia version is available), which is effective from 1 April 2018. It supersedes the Tax Audit Framework 2017 issued on 1 May 2017.

The key differences as compared to the Tax Audit Framework 2017 are:

1) Action before audit

The taxpayer will be notified via a Document and Information Requisition Letter ("Letter") either through official email / fax / post. In certain desk audit cases, the Letter will not be issued. Instead, the taxpayer will receive the notice of assessment together with the details of tax adjustments. [*as stated in 7.1.1 and 7.1.2 of the Tax Audit Framework 2018*].

2) Record checking during a tax audit

The sentence "The checking will not involve records for the year of assessment which statutory time limit has lapsed" (in 7.4.1 of the Tax Audit Framework 2017) has been removed. This indicates that the IRBM may request for time-barred records.

3) Registered tax agent

The Framework's emphasis on a "registered tax agent" (in 8.3. of the Tax Audit Framework 2018) may signify that the IRBM would not deal with any representative of the appointed tax agent but only a registered tax agent.

4) Shorter timeframes

Description	**Deadline under the**	
	Tax Audit Framework 2018	**Tax Audit Framework 2017**
Submission of documents and information from the date of receipt of the Letter [*as stated in 7.1.3*]	**14 days**	21 days
Submission of written objection to IRBM's proposed tax adjustment ▪ **The written objection should be submitted along with the additional documents and evidence which support the grounds of objection. [*as stated in 7.5.6*]**	**18 days**	21 days
Audit settlement period ▪ **The taxpayer would be informed if the IRBM is unable to settle the audit case within the stipulated period. [*as stated in 7.5.10*]**	**3 months (90 days)**	4 months (120 days)

Aside from the above, it should be emphasised that the Director General of Inland Revenue (DGIR) holds the discretion under Subsection 124(3) of the Income Tax Act 1967 (the ITA) to abate / remit any penalty imposed under the ITA (other than a conviction penalty). As stated in 10.1 of the 2018 Framework, in the event of an understatement / omission of any income arising from the audit findings, a penalty will be imposed under Subsection 113(2) of the ITA equal to the amount of tax payable (100%). However, the DGIR may use his discretion to impose a penalty at a rate of 45% on the understated tax.

Back to top

Practice Note No. 1/2018

As highlighted in our "Special Alert" on 30 March 2018, the IRBM had recently issued the Practice Note No. 1/2018 on 16 March 2018 with a view to providing guidance on the withholding of tax on income from the provision of digital advertising by a non-resident. You may view our "Special Alert" here.

Back to top

Keysight Technologies Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (High Court)

Issue:

Whether the application for judicial review by the taxpayer was premature and should thereby be dismissed as the taxpayer should have proceeded with the appeal process statutorily provided by the ITA.

Decision:

The High Court dismissed the appeal by the taxpayer on the issue with the following grounds of judgement:

1. The contents of the letter dated 9 June 2017 were merely to state the findings by the DGIR and could not be regarded as imposing any liability on the taxpayer. The letter could not be enforced against the taxpayer as it was subject to the issuance of an assessment on additional tax by way of notice of additional assessment under the ITA. As such, the taxpayer should have waited for the notice of additional assessment before it filed the application for judicial review. In fact, the taxpayer was only aggrieved when the DGIR raised the additional taxes vide notice of additional assessment dated 13 June 2017.

2. The liability of the taxpayer would only be triggered upon the service of the notice of additional assessment pursuant to the ITA, and only then would the taxpayer be liable to pay the sum due and payable under the ITA. The application to review the letter issued by the DGIR on 9 June 2017 was premature and should be dismissed.

3. There were also no exceptional circumstances as enumerated in Jagdis Singh's case that would merit the case to be reviewed by the High Court under Order 53 of the Rules of Court 2012, when there is already an appeal process under Section 99 of the ITA. In Jagdis Singh's case (*Government of Malaysia & Anor v. Jagdis Singh [1987] 2 MLJ 185*), the Supreme Court

held that the exceptional circumstances are lack of jurisdiction, or a blatant failure by the DGIR to perform some statutory duty or there was a serious breach of natural justice.

The taxpayer's submission that the appeal to the Special Commissioners of Income Tax (SCIT) under Section 99 of the ITA was not a reasonable or legitimate route as it would be required to pay the high additional taxes which would cause irreparable damages to the taxpayer did not fall within the "exceptional circumstance" that merit a judicial review.

4. Since the taxpayer had filed an appeal to the SCIT under Section 99 of the ITA on 10 July 2017, it would be an abuse of the court process to maintain the taxpayer's application for judicial review.

Back to top

Magnum Holdings Sdn Bhd, Magnum Berhad v KPHDN (High Court)

Issues:

1. Whether the application for leave to commence judicial review by the taxpayer should be dismissed as the taxpayer should have proceeded with the appeal process statutorily provided under Section 99 of the ITA; and

2. Whether the DGIR can segregate the taxpayer's investment in portfolio of shares, i.e., segregate investment in TVSB from investment in MCSB on the premise that the investment in TVSB did not produce any income.

Decision:

The taxpayer's application on all issues was allowed with the following grounds of judgement:

1. The High Court held that where there is an appeal procedure available to the taxpayer, judicial review should not normally be considered unless in exceptional circumstances. The exceptional circumstances required to be established by the taxpayer were that there was: a) clear lack of jurisdiction by the DGIR; b) blatant failure on the part of the DGIR to perform statutory duty; or c) serious breach of natural justice.

2. In the present application for judicial review by the taxpayer, the DGIR had failed to apply the legal position in *Multi-Purpose Holdings Bhd v. KPHDN [2001] 8 CLJ 462* (involving the same parties). Where the facts and the law of the taxpayer's case fell squarely within the case of Multi-Purpose, the decision in the Multi-Purpose case will be binding on both the SCIT and the DGIR. Since the Multi-Purpose case was binding on the DGIR and the DGIR had refused to apply the decision in Multi-Purpose, then the DGIR had **exceeded his jurisdiction**.

   In the Multi-Purpose case (supra), the issue was whether the sources of income mentioned in Section 4 of the ITA were indivisible and hence not open to further subdivision. The SCIT had decided that *"in respect of share income, all counters of shares relating to the case whether income-producing or non-income-producing are a single source of income under Section 4(c) of the ITA and that the same principle equally applied to interest income*". Thus the SCIT had allowed deductions in respect of dividend income and interest income. This decision by SCIT was affirmed by the High Court and DGIR did not appeal against the decision.

3. In the case of *KPHDN v Mudah.My Sdn Bhd [2017] 5 CLJ 283*, the Court of Appeal held that if the taxpayer can demonstrate illegality, then it would be wrong to insist on the exhaustion of an alternative remedy, i.e., an appeal to the SCIT. In addition, if the DGIR was seeking to revisit the legal position in the Multi-Purpose case, then the proper forum was the court, as both the SCIT and the DGIR are equally bound to apply the High Court's decision in Multi-Purpose. The High Court thereby allowed the application for leave by the taxpayer.

Back to top

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http://www2.deloitte.com/my/en/services/tax.html

Tax Team - Contact us

Service lines / Names	Designation	Email	Telephone
Business Tax Compliance & Advisory			
Yee Wing Peng	Managing Director	wpyee@deloitte.com	+603 7610 8800
Julie Tan	Executive Director	jultan@deloitte.com	+603 7610 8847
Stefanie Low	Executive Director	gelow@deloitte.com	+603 7610 8891
Choy Mei Won	Director	mwchoy@deloitte.com	+603 7610 8842
Business Process Solutions			
Julie Tan	Executive Director	jultan@deloitte.com	+603 7610 8847
Gabriel Kua	Director	gkua@deloitte.com	+606 281 1077
Shareena Martin	Director	sbmartin@deloitte.com	+603 7610 8925
Capital Allowances Study			
Chee Pei Pei	Executive Director	pechee@deloitte.com	+603 7610 8862
Sumaisarah Abdul Sukor	Associate Director	sabdulsukor@deloitte.com	+603 7610 8331
Global Employer Services			
Ang Weina	Executive Director	angweina@deloitte.com	+603 7610 8841
Chee Ying Cheng	Director	yichee@deloitte.com	+603 7610 8827
Michelle Lai	Director	michlai@deloitte.com	+603 7610 8846

Government Grants & Incentives			
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Thin Siew Chi	Executive Director	sthin@deloitte.com	+603 7610 8878
Indirect Tax			
Tan Eng Yew	Executive Director	etan@deloitte.com	+603 7610 8870
Senthuran Elalingam	Executive Director	selalingam@deloitte.com	+603 7610 8879
Chandran TS Ramasamy	Director	ctsramasamy@deloitte.com	+603 7610 8873
Larry James Sta Maria	Director	lstamaria@deloitte.com	+603 7610 8636
Wong Poh Geng	Director	powong@deloitte.com	+603 7610 8834
International Tax & Business Model Optimisation			
Tan Hooi Beng	Executive Director	hooitan@deloitte.com	+603 7610 8843
Mergers & Acquisitions			
Sim Kwang Gek	Executive Director	kgsim@deloitte.com	+603 7610 8849
Private Wealth Services			
Thin Siew Chi	Executive Director	sthin@deloitte.com	+603 7610 8878
Chris Foong	Director	tfoong@deloitte.com	+603 7610 8880
Tax Audit & Investigation			
Chow Kuo Seng	Executive Director	kuchow@deloitte.com	+603 7610 8836
Stefanie Low	Executive Director	gelow@deloitte.com	+603 7610 8891
Transfer Pricing			
Theresa Goh	Executive Director	tgoh@deloitte.com	+603 7610 8837
Subhabrata Dasgupta	Executive Director	sudasgupta@deloitte.com	+603 7610 8376
Philip Yeoh	Executive Director	phyeoh@deloitte.com	+603 7610 7375

Gagan Deep Nagpal	Director	gnagpal@deloitte.com	+603 7610 8876
Justine Fan	Director	jufan@deloitte.com	+603 7610 8182
Vrushang Sheth	Director	vsheth@deloitte.com	+603 7610 8534
Yvonne Sing	Director	ysing@deloitte.com	+603 7610 8079

Sectors / Names	Designation	Email	Telephone
Automotive			
Stefanie Low	Executive Director	gelow@deloitte.com	+603 7610 8891
Financial Services			
Chee Pei Pei	Executive Director	pechee@deloitte.com	+603 7610 8862
Gooi Yong Wei	Executive Director	ygooi@deloitte.com	+603 7610 8981
Mark Chan	Director	marchan@deloitte.com	+603 7610 8966
Mohd Fariz Mohd Faruk	Director	mmohdfaruk@deloitte.com	+603 7610 8153
Oil & Gas			
Toh Hong Peir	Executive Director	htoh@deloitte.com	+603 7610 8808
Kelvin Kok	Director	kekok@deloitte.com	+603 7610 8157
Real Estate			
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Telecommunications			
Thin Siew Chi	Executive Director	sthin@deloitte.com	+603 7610 8878

Branches / Names	Designation	Email	Telephone
Penang			
Ng Lan Kheng	Executive Director	lkng@deloitte.com	+604 218 9268
Au Yeong Pui Nee	Director	pnauyeong@deloitte.com	+604 218 9888
Everlyn Lee	Director	evelee@deloitte.com	+604 218 9913

Monica Liew	Director	monicaliew@deloitte.com	+604 218 9888
Tan Wei Chuan	Director	wctan@deloitte.com	+604 218 9888
Ipoh			
Ng Lan Kheng	Executive Director	lkng@deloitte.com	+604 218 9268
Lam Weng Keat	Director	welam@deloitte.com	+605 253 4828
Melaka			
Julie Tan	Executive Director	jultan@deloitte.com	+603 7610 8847
Gabriel Kua	Director	gkua@deloitte.com	+606 281 1077
Johor Bahru			
Chee Pei Pei	Executive Director	pechee@deloitte.com	+603 7610 8862
Thean Szu Ping	Director	spthean@deloitte.com	+607 222 5988
Kuching			
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Philip Lim Su Sing	Director	suslim@deloitte.com	+608 246 3311
Chai Suk Phin	Associate Director	spchai@deloitte.com	+608 246 3311
Kota Kinabalu			
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Cheong Yit Hui	Manager	yicheong@deloitte.com	+608 823 9601

Yee Wing Peng

Julie Tan

Stefanie Low

Chee Pei Pei

Ang Weina

Tham Lih Jiun

Thin Siew Chi

Tan Eng Yew

Senthuran Elalingam

Tan Hooi Beng

Sim Kwang Gek

Chow Kuo Seng

Theresa Goh

Subhabrata Dasgupta

Philip Yeoh

Gooi Yong Wei

Toh Hong Peir

Ng Lan Kheng

Choy Mei Won

Gabriel Kua

Shareena Martin

Chee Ying Cheng

Michelle Lai

Chandran TS Ramasamy

Larry James Sta Maria

Wong Poh Geng

Chris Foong

Gagan Deep Nagpal

Justine Fan

Vrushang Sheth

Yvonne Sing

Mark Chan

Mohd Fariz Mohd Faruk

Kelvin Kok

Au Yeong Pui Nee

Everlyn Lee

Monica Liew

Tan Wei Chuan

Lam Weng Keat

Thean Szu Ping

Philip Lim Su Sing

Sumaisarah Abdul Sukor

Chai Suk Phin

Cheong Yit Hui