Deloitte.

Malaysia | Tax | December 2015

Tax Espresso
A snappy delight

Greetings from Deloitte Malaysia Tax Services

Commonwealth Association of Tax Administrators (CATA) Member Countries Serious in Overcoming Transfer Pricing

Quick links:

Deloitte Malaysia

Inland Revenue Board

Takeaways:

CATA Member Countries Serious in Overcoming Transfer Pricing and Base Erosion and Profit Shifting Issues

Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) (Amendment) Rules 2015 [P.U. (A) 284/2015]

(TP) and Base Erosion and Profit Shifting (BEPS) Issues

According to the Media Release issued by the Inland Revenue Board (IRB) on 17 November 2015, delegates at the CATA conference have had serious discussions on ways to overcome various BEPS issues, especially on TP and treaty abuse. In the conference, the IRB has informed that it has taken several actions to address TP and BEPS issues.

Actions on TP issues:

i) A general tax avoidance provision in the Income Tax Act 1967 (ITA) is in place to combat tax avoidance;
ii) Introduction of specific TP tax legislation and Income Tax (TP) Rules 2012 [P.U. (A) 132/2012] to address TP related issues;
iii) Release of 2012 Malaysian TP Guidelines to provide guidance on the application of the TP regulation and administrative requirements;
iv) Issuance of TP Audit Framework 2013 to provide guidance on TP audits; and
v) Conducting numerous audits on multinational companies to scrutinize their TP practices.

Actions on BEPS issues:

i) Update and revise the ITA and other relevant provisions to align with international standards where such standards are applicable and relevant locally;
ii) Reviewing the relevant tax legislations to keep abreast with the changes and development of the BEPS projects under the mandate of the Organisation for Economic Co-operation and Development (OECD);
iii) Actively involved in selected BEPS Working Party and OECD meetings to discuss the BEPS Action Plan; and

Double Taxation Relief (The Government of the Slovak Republic) Order 2015 [P.U. (A) 256/2015]

Public Ruling No. 7/2015: Appeal against an Assessment and Application for Relief

Updated Guidelines on Advance Rulings

Tax Cases:

Malayan Banking Berhad v Ketua Pengarah Hasil Dalam Negeri (KPHDN) - High Court

KPHDN v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) & Anor – Court of Appeal

Events:

Breakfast Talk
Price Control & Anti-Profiteering Regulations 2014 – Practical Issues and Practical Solutions
Date: 14 January 2016
Venue: Menara LGB
Kuala Lumpur

2015 Employer's Income Tax Reporting

Date	Venue
19 Jan 2016	Penang
21 Jan 2016	Kuala Lumpur
21 Jan 2016	Ipoh

Important deadlines:

Due date for 2017 tax estimates for companies with January year-end
(1 January 2016)

iv) Set-up a BEPS Action Committee in the IRB to discuss on the results from various BEPS meetings, suggestions or follow up on certain issues, implications on domestic law as well as recommendations to the government, where applicable.

6th month revision of tax estimates for companies with June year-end
(31 December 2015)

9th month revision of tax estimates for companies with March year-end
(31 December 2015)

Statutory filing of 2015 tax returns for companies with May year-end
(31 December 2015)

Gazette Orders

Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) (Amendment) Rules 2015 [P.U. (A) 284/2015]

The Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) (Amendment) Rules 2015 [P.U. (A) 284/2015] ("Amendment Rules") were gazetted on 2 December 2015.

The Amendment Rules amend Paragraph 7 of the Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) Rules 2014 [P.U. (A) 217/2014] and shall be deemed to have effect from the year of assessment (YA) 2014.

The Amendment Rules clarify that the non-application of the latter Rules [P.U. (A) 217/2014] applies to a person who has incurred qualifying capital expenditure on an information and communication technology equipment for a basis period and has claimed other incentives or exemptions (as listed below) on such equipment during that basis period.

i) investment tax allowance under the Promotion of Investments Act 1986 [Act 327];
ii) reinvestment allowance under Schedule 7A of the ITA;
iii) investment allowance for service sector under Schedule 7B of the ITA;
iv) accelerated capital allowance under any rules made under Section 154 of the ITA; or
v) tax exemption under any order made under Section 127 of the ITA in respect of his statutory income which is equivalent to any part or the whole of the amount of the qualifying capital expenditure incurred by the person.

Double Taxation Relief (The Government of the Slovak Republic) Order 2015 [P.U. (A) 256/2015]

P.U. (A) 256/2015 was gazetted on 30 October 2015 and the Schedule of P.U. (A) 256/2015 contains the Agreement between Malaysia and The Slovak Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

The provisions of the Agreement will be applicable in Malaysia in respect of tax chargeable for any YA beginning on or after 1 January of the calendar year following the year in which the Agreement enters into force.

Public Ruling (PR)

PR No. 7/2015: Appeal against an Assessment and Application for Relief

The IRB has issued PR No. 7/2015 on 22 October 2015 to replace the PR No. 3/2012 dated 4 May 2012. New/amended paragraphs in the new PR include the following:

i) the right of appeal under Section 99 of the ITA effective 24 January 2014 and its procedure; and
ii) the application for relief in respect of error or mistake under Section 131 of the ITA and its procedure.

Among the key points of this PR are:

i) Interpretation
   - ✓ "Person" is redefined to include a company, a body of persons, a limited liability partnership and a corporation sole.
   - ✓ A new definition on "notice of assessment" is included in this PR. The definition of "notice of assessment" includes notification of non-chargeability and notification of refund of over-payment.

ii) Effective 24 January 2014, Section 99 of the ITA shall apply only to appeals on the following notices of assessment made for any YA:
   - ✓ Assessment / additional assessment / advanced assessment / notification of non-chargeability which are made by the Director General of Inland Revenue (DGIR) as a result of desk audit or field audit findings; or
   - ✓ Best judgement assessment made without Income Tax Return Form (ITRF) or late submission of ITRF under Section 90(3) of the ITA.

iii) Section 99 of the ITA shall not apply to:
   - ✓ deemed assessment under Sections 90(1) and Section 91A of the ITA unless the taxpayer disagrees with the treatment stated in a PR or a known stand, rules and practices of the DGIR prevailing at the time when the assessment is made.
   - ✓ composite assessment provided under Section 96A of the ITA as the assessment is made after an agreement has been reached between the taxpayer and the DGIR.

iv) No appeal can be made in respect of a notice of reduced assessment because such notice is not an assessment unless there are issues in the notice that are disputed by the taxpayer. (*Note: This view of the DGIR is inconsistent with the decision of the tax case, "Malayan Banking Berhad v Ketua Pengarah Hasil Dalam Negeri".*)

v) A person may make an application for a notification of non-chargeability and a tax computation from any IRB branch that handles his income tax file.

vi) Form Q cannot be signed by a tax agent or a lawyer. For companies and limited liability partnerships, Form Q must be signed by a person authorised under Sections 75 and 75B of the ITA respectively.

vii) The onus of proving that there is an error or mistake shall be on the taxpayer if an application for relief under Section 131 of the ITA is made. Such application must be made by way of a letter or Form CP15C to the DGIR within five (5) years after the end of the YA in which the assessment is deemed. The taxpayer must pay all taxes that have been made for the YA in which an application in respect of the error or mistake is made. Application for relief under Section 131 of the ITA will not be considered if the ITRF is made in accordance with the known stand, rules and practices of the DGIR prevailing at the time when the assessment is made. Consideration may be given to a person for relief under Section 131 of the ITA if approval for any tax benefit is only obtained after the submission of ITRF.

Updated Guidelines on Advance Rulings

The IRB has issued the updated Guidelines on Advance Rulings dated 1 October 2015 to make the Guidelines clearer and easier to understand. There is no material change in this updated Guidelines.

Section 138B of the ITA allows a person to request for an advance ruling from the DGIR by using a prescribed form. Upon request, the DGIR is empowered to make an advance ruling on how the provision of the ITA would apply to the person and to the proposed arrangement described in the application. The issuance of an advance ruling aims to ensure clarity and certainty of tax treatment and consistency in the application of the income tax laws.

The DGIR will ensure that the advance ruling will be issued within the stipulated time frame of sixty (60) days from the date a complete application is submitted. This time frame is allocated provided that all relevant information is furnished together with the application and further consultation with the applicant is not necessary. The applicant will be informed by the DGIR if any delay in the issuance of the advance ruling is expected. The advance ruling will only be issued to the applicant after all fees are paid.

An advance ruling may be either favourable or unfavourable to the interpretation desired by the applicant. The advance ruling issued is only applicable to the applicant and is binding on the applicant and the DGIR only. Penalty may be imposed by DGIR for non-compliance with the advance ruling made.

Tax Case

Malayan Banking Berhad v Ketua Pengarah Hasil Dalam Negeri (KPHDN) - High Court

Issue

Whether notification of reduced amount is an assessment appealable under Section 99 of ITA.

Decision

Based on the following grounds, the High Court has the same view as the taxpayer that the KPHDN was wrong in refusing to forward the Form Q filed by the taxpayer on the basis that the notification of reduced assessment is not an assessment appealable under Section 99 of the ITA:

Section 2 of the ITA defines assessment as “any assessment or additional assessment made under this Act” and Section 99(1) of the ITA allows an aggrieved person to appeal against assessment made against him.

As decided by the case of *ABC v The Comptroller of Income Tax, Singapore [1959] 1 MLJ 162*, the assessment itself is the administrative act of the comptroller and determines the quantum of the tax and actual assessment is not required to be in writing. Therefore, ‘assessment’ is the KPHDN’s ascertainment which is his administrative act and need not be in writing. Hence the High Court held that as KPHDN has made his ascertainment in the notification of reduced assessment, it is only right for the taxpayer to have the right to file the Form Q to appeal. ITA does not state that the appeal can only be made against Section 77A of the ITA.

KPHDN v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) & Anor – Court of Appeal

Issues

i) Whether the KPHDN had acted unreasonably in failing to give reasons why the payments were subject to withholding tax; and
ii) Whether the payments made were royalty or for services rendered by the non-resident company.

Decision

The Court of Appeal upheld the decision of the High Court and ruled in favour of the taxpayer based on the following grounds:

i) The Court of Appeal was of the view that the KPHDN's argument that there is no provision under Section 140(5) of the ITA that the KPHDN has to provide reasons for his decision, is not applicable in this case. There are ample authorities that state where a public decision maker fails to provide reasons, the courts are at liberty to conclude that he has no good reason in making his decision.
ii) The KPHDN had acted unreasonably by invoking both Sections 109 and 109B of the ITA in deciding that the payments were royalty within the meaning of Section 2 of the ITA. The KPHDN had not only committed an error of law but exceeded his statutory power by relying on both sections of the ITA. These sections are distinctly different and each section deals with a different subject matter. The KPHDN was indecisive and could not make up his mind as to which particular section of the ITA applied in respect of payments for the 'leased communication facilities' and invoked both sections. It is clear that the KPHDN had made a decision arbitrarily in the exercise of his statutory power to the detriment of the taxpayer. There are ample authorities to show that any doubt as to the applicable provision of the taxing statute must be held in favour of the taxpayer. Besides, the KPHDN had taken into consideration irrelevant matters by relying on the unsigned draft agreement for services provided by the non-resident for the years prior to the years under dispute which was irrelevant and should not be relied to form the basis of KPHDN's decision. In view of the above, the Court of Appeal dismissed the appeal by the KPHDN and held that it was not necessary to decide on the merits whether the payments made by the taxpayer to the non-resident were in law royalty within the meaning of Section 2 of the ITA.

Contact Us

Services / 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
Business Model Optimisation			
Hisham Halim	Executive Director	hihalim@deloitte.com	(603) 7610 8832
Business Process Solutions			
Julie Tan	Executive Director	jultan@deloitte.com	(603) 7610 8847
Gabriel Kua	Director	gkua@deloitte.com	(606) 281 1077
Financial Services			
Chee Pei Pei	Executive Director	pechee@deloitte.com	(603) 7610 8862
International Tax			
Tan Hooi Beng	Executive Director	hooitan@deloitte.com	(603) 7610 8843
Oil & Gas			
Toh Hong Peir	Executive Director	htoh@deloitte.com	(603) 7610 8808
Mergers & Acquisitions			
Sim Kwang Gek	Executive Director	kgsim@deloitte.com	(603) 7610 8849
R&D and Government Incentives			
Hisham Halim	Executive Director	hihalim@deloitte.com	(603) 7610 8832
Real Estate			
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	(603) 7610 8875
Tax Audit & Investigation			
Chow Kuo Seng	Executive Director	kuchow@deloitte.com	(603) 7610 8836
Global Employer Services			
Ang Weina	Executive Director	angweina@deloitte.com	(603) 7610 8841

Services / Names	Designation	Email	Telephone
Indirect Tax			
Tan Eng Yew	Executive Director	etan@deloitte.com	(603) 7610 8870
Fan Kah Seong	Executive Director	kfan@deloitte.com	(603) 7610 8859
Robert Tsang	Executive Director	robtsang@deloitte.com	(+65) 6530 5523
Transfer Pricing			
Theresa Goh	Executive Director	tgoh@deloitte.com	(603) 7610 8837
Ian Clarke	Executive Director	iaclarke@deloitte.com	(603) 7610 8824
Hisham Halim	Executive Director	hihalim@deloitte.com	(603) 7610 8832

Branches / Names	Designation	Email	Telephone
Penang			
Ng Lan Kheng	Executive Director	lkng@deloitte.com	(604) 218 9888
Everlyn Lee	Director	evelee@deloitte.com	(604) 218 9913
Ipoh			
Ng Lan Kheng	Executive Director	lkng@deloitte.com	(604) 218 9888
Lam Weng Keat	Director	welam@deloitte.com	(605) 253 4828
Melaka			
Fan Kah Seong	Executive Director	kfan@deloitte.com	(603) 7610 8859
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
Chai Suk Phin	Senior Manager	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


Hisham Halim


Chee Pei Pei


Tan Hooi Beng

Toh Hong Peir

Sim Kwang Gek

Tham Lih Jiun

Chow Kuo Seng

Ang Weina

Tan Eng Yew

Fan Kah Seong

Robert Tsang

Theresa Goh

Ian Clarke

Ng Lan Kheng

Everlyn Lee

Lam Weng Keat

Gabriel Kua

Thean Szu Ping

Chai Suk Phin

Cheong Yit Hui

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