

## Finance Bill 2019 (Amendment in Committee)

Further to the tabling of Finance Bill 2019 in Parliament on 11 October 2019, the following amendments in committee have been passed.

### 1. Acquisition price for RPGT purposes

A new paragraph is inserted to confirm that the proposal to deem market value as at 1 January 2013 as the acquisition price for disposal of chargeable asset (i.e. real property) acquired prior to year 2013 by a Malaysian citizen and permanent resident does not apply to the disposal of chargeable asset under Paragraph 34 (*shares acquired as consideration for the transfer of asset to a controlled company*) and Paragraph 34A (*shares held in a Real Property Company*) of Schedule 2 of the Real Property Gains Tax Act 1976.

### 2. Review of tax agent licence application procedures

The proposal to amend the procedures in the application and renewal of tax agent licence has been removed. With the removal of the proposal, the existing procedures remain unchanged and the Ministry of Finance will continue to review and approve an application or renewal of tax agent licence under Section 153.

## Labuan Business Activity Tax (Amendment) Bill 2019

### 1. Taxation of a Labuan entity which fails to comply with substance requirement

A Labuan entity carrying on a Labuan business activity which fails to comply with the substance requirements under the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 [P.U.(A) 392/2018] for a basis period for a year of assessment (YA) shall be taxed at the rate of 24% upon its chargeable profits for that YA under the Labuan Business Activity Tax Act 1990 (the LBATA).

The Regulations which were gazetted on 31 December 2018 and came into operation on 1 January 2019 specify the substantive requirements (i.e. the minimum number of full time employees in Labuan and the minimum amount of annual operating expenditure in Labuan) for each Labuan business activity, for a basis period for a YA.

Effective: Year of assessment 2020\*

\*Basis period for a year of assessment means the accounting period or periods ending in the preceding calendar year. For example, year of assessment 2020 for a Labuan entity having an accounting period ending 31 December refers to its accounting period ending 31 December 2019.

*Our commentary:*

(a) *The above proposal reversed the previous position where the understanding was that the provisions under the Income Tax Act 1967 (the ITA) shall apply if the Labuan entity fails to comply with the substance requirements as specified in the Regulations. This may have significant impact to those taxpayers who rely on the*

*exemptions provided under the ITA. An issue that needs to be clarified with the Inland Revenue Board (IRB) is whether non-trading income such as dividend received by an investment holding company in Labuan from a foreign subsidiary is exempted from tax or would be taxed at 24% under the LBATA.*

*(b) Whilst one may elect to be taxed under the ITA, the deadline for the submission of the election for YA 2020 would have lapsed (an election must be made within three months after the beginning of the basis period for a YA i.e. by 31 March 2019 if the year-end is 31 December). It remains to be seen if concession will be granted by the IRB to allow the taxpayers to make an election to be taxed under ITA for the YA 2020.*

*(c) While we are of the view that the provisions under the ITA shall apply to a Labuan entity that carries out activity other than those listed in the Regulations, confirmation from the IRB is needed.*

## **2. Determination of residence status for the purposes of a DTA under Section 132 of the ITA**

A new Section 3B is introduced to determine the residence status of a Labuan entity specifically for the purpose of double taxation arrangement (DTA) effected under Section 132 of the ITA.

<b>Categories of Labuan entity</b>	<b>Resident for DTA purposes</b>
A Labuan entity carrying on a business or businesses for the basis year for a YA	The Labuan entity is resident in Malaysia for the basis year for a YA if at any time during that basis year the management and control of its business or of any one of its businesses, as the case may be, are exercised in Malaysia.
Any other Labuan entity	The Labuan entity is resident in Malaysia for the basis year for a YA if at any time during that basis year the management and control of its affairs are exercised in Malaysia by its directors, partners, trustees or other controlling authority.

Effective: Year of assessment 2020

## **3. Power to raise assessments/additional assessments**

It is proposed that the Director General (DG) may raise assessment or additional assessment, where it appears to him that no or no sufficient assessment has been made on a person chargeable to tax for any YA but time-barred period apply as shown in the table below.

<b>Type of cases</b>	<b>Time-barred period</b>

Non-transfer pricing cases	Within 5 years after the end of the YA
Transfer pricing cases	Within 7 years after the end of the YA
Cases that involve fraud, willful default or negligence	No limit

Effective: Year of assessment 2020

#### 4. Tax due and payable and penalty on late payment

A new Section 13A is inserted to provide that a tax payable arising from an assessment made under Section 6 of the LBATA is due and payable when the notice of assessment is served on a person. If the tax is not paid within thirty days after the service of the notice, the tax unpaid will be increased by 10% and that sum shall be recoverable as tax due and payable under the LBATA.

Effective: Year of assessment 2020

*Our commentary:*

*From our interpretation of the new Section 13A, tax payable is due within 30 days from the date of service of the notice. However the existing Section 11 of the LBATA also requires tax to be paid in full on filing of the statutory declaration and return of its profits for a YA under Section 5. It appears that these two provisions are contradicting and clarification should be sought from the IRB.*

#### 5. Right of appeal

A person aggrieved by an assessment made by the DG may appeal to the Special Commissioners of Income Tax (SCIT) in the same manner as an appeal against an assessment of income tax under the ITA and Sections 99, 100, 101 and 102 of the ITA, as far as they are applicable with the necessary modifications. Further, it is proposed that the procedures of hearing of appeals (i.e. appeals to the SCIT and the other courts) in Schedule 5 of the ITA shall be applicable, with necessary modifications, to an appeal or further appeal made under the LBATA.

Effective: Year of assessment 2020

#### 6. Taxation of income derived from Intellectual Property Right

It is proposed that Section 9 of the LBATA be amended to clarify that the profit of a Labuan entity carrying on a Labuan business activity which is a Labuan non-trading activity that is not chargeable to tax under the LBATA does not include income derived from royalty and other income derived from an intellectual property right which is receivable for the commercial exploitation of that right. Any income derived from such intellectual property right is subject to tax under the ITA.

“Intellectual property right” has the same meaning assigned to it under Subsection 4(5) of the LBATA.

Effective: Deemed to have come into operation on 1 January 2019

## **7. General anti-avoidance provisions**

A new Section 17C is introduced to allow the DG to disregard and make adjustments in relation to certain transactions that have the direct or indirect effect of altering the incidence of tax, relieving any person from any liability to pay tax, evading or avoiding any duty or liability which is imposed or would otherwise have been imposed or hindering or preventing the operation of the Act.

Effective: Year of assessment 2020

## **8. Transfer pricing adjustment**

The new Section 17D is a special provision introduced relating to a transaction between related parties and in particular, on the matter pertaining to transfer pricing. With the proposed amendment, the DG may substitute the price in a related party transaction for the acquisition or supply of property or services where one has control over the other person and the transaction was not at arm's length.

Effective: Year of assessment 2020

## **9. Power to call for returns and information, access to buildings, documents, etc.**

The proposed new Sections 22B, 22C and 22D provide power to the DG to call for specific returns and production of books and statement of bank accounts. The DG shall have the power to access and to search all lands, buildings, and places including the power to inspect and take possession of any books, documents, objects, articles, materials, and things to which he has access to and the officer making the search shall prepare the search list of all things found and seized.

Failure to comply with the DG's notice to call for returns or the production of books, etc. will constitute an offence and on conviction, the taxpayer shall be liable to a fine not exceeding one million ringgit, or to imprisonment for a term not exceeding two years or to both.

Effective: Year of assessment 2020

## **10. Duty to keep records**

Every person who is required to furnish a return of his profits must keep records for a period of seven years from the end of the YA for the purposes of ascertaining his chargeable profit and tax payable under the proposed new Section 22E.

If the person failed to furnish a return within the specified period for a YA, that person shall keep the records that relate to that YA for a period of seven years after the end of the year in which the return is furnished.

All records that relate to any profit in Malaysia shall be kept and retained in Malaysia.

Effective: Year of assessment 2020

## 11. Compounding of offences

It is proposed that the DG may compound offences committed under Section 22 or 23 with the written consent of the Public Prosecutor. It is also proposed that all money received shall be paid into and form part of the Consolidated Fund.

Effective: Upon coming into operation of the Labuan Business Activity Tax (Amendment) Act 2019

## The Income Tax (Amendment) Bill 2019 and the Petroleum (Income Tax) (Amendment) Bill 2019

The following amendments were proposed in both the Income Tax (Amendment) Bill 2019 and the Petroleum (Income Tax) (Amendment) Bill 2019.

### 1. Amendment to the hearing of appeals by the Special Commissioners of Income Tax (SCIT)

Currently a panel of three Special Commissioners shall hear an appeal and one of the Special Commissioners on the panel must be a person with judicial or other legal experience. If any one of the three Special Commissioners who has commenced hearing any of the appeals is unable to complete the hearing due to expiration of the term of his appointment or other reason, the hearing may, with the consent of both parties, be heard afresh or continued by the remaining Special Commissioners with another Special Commissioner.

Proposals:

- a) The Chairman of the SCIT be empowered to determine the sitting of an appeal to be heard by a Special Commissioner sitting alone if the Chairman deems it fit for the expeditious and efficient conduct of the appeal; and
- b) if the Special Commissioner who has commenced hearing any of the appeals alone [as provided in paragraph (a) above] is unable to complete the hearing due to expiration of the term of his appointment or other reason, the hearing may, with the consent of both parties, be heard afresh or continued by another Special Commissioner.

Effective: Upon coming into operation of the Income Tax (Amendment) Act 2019 and Petroleum (Income Tax) (Amendment) Act 2019

### 2. Amendment to the appeal procedures to the High Court against the decision of the SCIT

The amendment bill proposed to introduce new procedures for the filing of an appeal to the High Court by the party aggrieved by a deciding order of the SCIT.

- First : Issuance of deciding order by the SCIT  
Second : Submission of notice of appeal by the appellant\* and request in writing of notes of proceeding and grounds of decision within 21 days from the date of the SCIT's decision



- Third : Appellant is required to file the record of appeal to the High Court within 60 days from the date of filing of notice of appeal
- Forth : Appellant is required to file the notes of proceeding and grounds of decision to the High Court
- Fifth : Case management and hearing of appeal before the High Court based on the record of appeal

\*It is also proposed that appellant shall pay for the cost of the notes of proceedings or other documents, at such rate as may be prescribed by the Minister of Finance.

Effective: Upon coming into operation of the Income Tax (Amendment) Act 2019 and Petroleum (Income Tax) (Amendment) Act 2019

Other amendments not specifically highlighted are minor or consequential in nature.