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LHDN.01/35/42/51/122/3

GUIDELINES ON ADVANCE RULINGS

1. INTRODUCTION

With effect from 1 January 2007, the Inland Revenue Board of Malaysia (IRBM) may issue advance rulings on the interpretation and application of the income tax provisions under the Income Tax Act 1967 [ITA] upon request by any person. This new service by IRBM was announced by the Honourable Prime Minister in the Budget 2007 speech.

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. This in turn will help to promote compliance and minimize disputes between the IRBM and taxpayers.

2. RELEVANT PROVISIONS

- 2.1 Specific provisions are introduced in the ITA to implement the advance ruling system. Section 138B of the ITA allows a person to request for an advance ruling from the Director General of Inland Revenue (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 arrangement for which the advance ruling is sought.
- 2.2 Paragraphs 154(1)(eb) and 154(1)(ec) of the ITA empower the Minister of Finance to provide for the scope and procedure in relation to the advance ruling and to prescribe the fees to be imposed in relation to the advance ruling.
- 2.3 The Income Tax (Advance Ruling) Rules 2008 [AR Rules] which is effective from 1 January 2007 outlines the scope, procedure and fees imposed with respect to an advance ruling.

3. MEANING OF AN ADVANCE RULING

An advance ruling is a written statement by the DGIR to a person giving an interpretation on how any provision of the ITA applies to a proposed arrangement described in an application.

4. BINDING NATURE OF AN ADVANCE RULING

4.1 An advance ruling is binding upon a person in relation to an arrangement and only for the period or year of assessment specified in the advance ruling. It should not be taken as a precedent for other cases. If the arrangement stipulated in the advance ruling is not carried out by the end of the time period, the advance ruling will lapse automatically.

4.2 An advance ruling is binding upon the DGIR, subject to any qualification stated in the advance ruling. However, the advance ruling will not be binding in the following circumstances:-

- a. the arrangement carried out by the person is materially different from the arrangement stated in the advance ruling. As an example, the transaction has differed in such a way that the provision of the ITA as stated in the advance ruling is no longer applicable or can no longer be applied to it;
- b. there was a material omission or misrepresentation or inaccuracy in connection with the application of the advance ruling;
- c. the DGIR makes an assumption about a future event or any other matter that is material to the advance ruling, and that assumption subsequently proves to be incorrect; or
- d. the person fails to satisfy any of the conditions stipulated by the DGIR.

5. DEFINITION OF TERMS

For the purposes of these guidelines, the terms 'arrangement' and 'seriously contemplated' are defined as follows:-

5.1 **"Arrangement"**: It includes any scheme, contract, agreement, plan or undertaking, whether enforceable or not, including all the steps and transactions that carry it into effect.

5.2 **"Seriously contemplated"**: A concerted effort and a definite course of action, whether unilateral or otherwise, has been made to undertake the arrangement in the near future.

6. SCOPE OF AN ADVANCE RULING

- 6.1 A request for an advance ruling has to be one where the issue requires an interpretation of the income tax law and not one seeking to know what the law already clearly provides, for example the determination of residence status of a person.
- 6.2 A request for an advance ruling has to be one where the proposed **arrangement** is **seriously contemplated** by the person for implementation in the near future. The person would have to forward relevant documents as evidence to indicate a seriously contemplated arrangement.
- 6.3 Section 138B of the ITA generally allows a person to obtain an advance ruling indicating how any provision of the ITA would apply to the person's proposed arrangement. Thus, an advance ruling will only be made if there is a proposed arrangement which is being seriously contemplated. Furthermore, there are restrictions on the scope of advance ruling that may be given by the DGIR. As specified under the AR Rules, no advance ruling will be provided if the matter sought is in relation to a provision of the ITA that empowered or required the Minister or DGIR to do the following:-
 - a. impose or remit a penalty (for example subsection 112(3) or 124(1) of the ITA);
 - b. remit tax due and payable (for example section 129 of the ITA);
 - c. approve any application under the ITA (for example section 34A, 150 or subsection 44(6) of the ITA);
 - d. inquire into the correctness of any statement or other information supplied by any person (for example section 78 of the ITA);
 - e. prosecute any person (for example section 114 of the ITA); or
 - f. recover any debt owing by any person (for example section 106 of the ITA).

7. CIRCUMSTANCES WHERE AN ADVANCE RULING IS NOT ISSUED

The DGIR is not obligated to issue an advance ruling for all applications. There are circumstances whereby the DGIR shall not make an advance ruling. The circumstances are as follows:-

- a. the arrangement has been entered into or effected at the time of application or at any time before the advance ruling is issued. Likewise,

no advance ruling shall be made for a completed transaction or a series of transactions to an arrangement that has been carried out significantly in advance;

- b. the application is frivolous, vexatious or based on hypothetical situation;
- c. the issue raised would require the interpretation of any foreign law; or is being dealt with or should be dealt with by the competent authorities of the parties to an Agreement for the avoidance of double taxation;
- d. an advance ruling already exists on how the relevant provision of the ITA applies to the person and to the arrangement, and the person makes a request for an advance ruling on the same arrangement which relates to the same period or year of assessment;
- e. an arrangement is the subject of an audit or investigation on how any provision of the ITA applies to the person and that person requests for an advance ruling on a similar arrangement;
- f. the DGIR is of the opinion that the person has not provided full information in relation to the application despite a request has been made for additional information;
- g. the advance ruling would require an opinion as to the generally accepted accounting principles or commercially accepted practices;
- h. the matter on which the advance ruling is sought involves an advance pricing arrangement or a tax avoidance scheme;
- i. The application involves an interpretation of a provision in the ITA that has not been enacted, for example budget proposals, rules or regulations which have not been enacted (under such circumstances, the person may seek a written technical confirmation from the DGIR); or
- j. the DGIR is of the opinion that it would be unreasonable to make an advance ruling in view of the resources available to him. For example, a request for an advance ruling relating to a highly technical and sophisticated arrangement or a new technology/product which has yet to be known to the DGIR.

8. CIRCUMSTANCES WHERE AN ADVANCE RULING MAY BE DECLINED

In addition to the above, an application for an advance ruling may generally be declined in the following circumstances:-

- a. the matter on which an advance ruling is requested is purely a question of fact, for example the determination of commencement date of a housing developer's project;
- b. the correctness of the advance ruling would depend on the making of assumptions, whether in respect of a future event or any other matter;
- c. the matter on which a ruling is sought is the subject of an appeal, whether in relation to that person or any other person; or
- d. the applicant has outstanding debts related to previous advance ruling applications.

9. NOTIFICATION OF NON-ISSUANCE OF ADVANCE RULING

In a case where the DGIR shall not make or declines to make an advance ruling, the applicant will be notified in writing at the earliest possible time and given the reasons for not making or declining to make an advance ruling.

10. APPLICATION PROCEDURE

A. Who Can Apply –

- 10.1 Any person may apply for an advance ruling on how a provision of the ITA applies or would apply to the person or the prospective person (as the case may be), and to any particular arrangement that falls under the purview of the advance ruling.
- 10.2 A person who is already in existence, for example a company which has already been incorporated in Malaysia, has to apply on its own behalf. However, a person may employ the services of an approved tax agent or a qualified lawyer, who has his practice in Malaysia to complete the application form and to prepare the submission for an advance ruling request on his behalf. In any instances, the application form has to be duly signed by the person responsible such as the director of a company, the precedent partner of a partnership etc.
- 10.3 An application can also be made jointly by two or more persons, for example a group of companies in the same group or partners of a partnership. In any instances, the application form has to be duly signed separately by each director, partner etc. according to the appropriate entity which forwarded the application.

- 10.4 A person who is yet to come into legal existence or a foreign entity/person has to apply through a representative who is appointed by him. The representative has to be an approved tax agent or a qualified lawyer (who have their practice in Malaysia). A representative acting on behalf of that person is required to forward a letter of authorization that authorized him to act on that person's behalf. The relevant section in the prescribed form regarding particulars of the representative has to be completed.

B. Application Form - Borang KA [1/2007]

- 10.5 An application for an advance ruling has to be made in the prescribed form (Borang KA [1/2007]) and by furnishing the following information:-
- a. a complete description of all relevant facts to an arrangement, including assumptions that would be made (if any) by the person in respect of the arrangement, names, addresses, business activities and any other relevant particulars of all parties to the arrangement;
 - b. the tax issue to be considered by the DGIR;
 - c. the provision of the ITA that relates to the issue raised in the application which include section of the ITA that is relevant to the application, appropriate case laws, published commentaries (if any), and legal reason that support the person's interpretation of the section involved;
 - d. state the stand or opinion on the tax treatment that should be accorded to the proposed arrangement for which the advance ruling is sought and identify the relevant provision of the ITA applicable to it.
 - e. commercial or business reason for the arrangement, if applicable;
 - f. copies of all relevant documents with the relevant parts or passages identified;
 - g. the period or year of assessment to which the advance ruling application relates; and
 - h. a statement whether an advance ruling application has been made previously by the applicant on the same or a similar arrangement. If so, state the outcome of the advance ruling application and the IRBM reference number of the advance ruling issued.

C. Requirement of Information –

- 10.6 In instances where the information provided by the applicant is insufficient, the DGIR has the right to request for further relevant information or carry out an on-site inspection.
- 10.7 On the other hand, the DGIR may waive any of the requirements needed to be submitted with the application, if the DGIR is of the opinion that it would be unreasonable to request for information which the applicant has no means of providing or has no access to it.

D. Withdrawal of Advance Ruling Request by Applicant -

- 10.8 Any person who has submitted an application for advance ruling can at any time before the advance ruling is issued, forward a notice in writing to the DGIR to withdraw his application. It is to be noted that fees would be imposed as stated in paragraph 15.2 of these guidelines in the case of withdrawal by the applicant.

11. ISSUANCE OF AN ADVANCE RULING

- 11.1 The DGIR will notify the applicant that the advance ruling has been made and the additional fees payable in relation to the advance ruling. The advance ruling will only be issued to the applicant after all fees payable are paid (please refer to paragraph 15 of these guidelines with regards to the fee structure).

- 11.2 An advance ruling made will state the following:-

- a. that it is an advance ruling made under section 138B of the ITA;
- b. the identity of the person, the provision of the ITA and reference to the arrangement in the application;
- c. how the provision of the ITA applies to the person and to the arrangement;
- d. the period or year of assessment for which the advance ruling applies;
- e. the material assumptions about future events or any other matters made by the DGIR; and
- f. the conditions (if any) imposed by the DGIR.

- 11.3 In preparing the advance ruling, additional information may be requested from the applicant. If the applicant cannot provide the necessary information, then the DGIR may issue an advance ruling based on assumptions. The assumptions made by the DGIR have to be appropriate. It is to be noted that the DGIR can decline to make an advance ruling where insufficient information is provided by the applicant.
- 11.4 Prior consultation between the IRBM and the applicant may be made. This is to provide space for clarification of information provided in the application. The IRBM is not obliged to disclose the decision to be made in the applicant's advance ruling at any time before it is issued.
- 11.5 On the receipt of an advance ruling by the person, he may apply in writing for an extension of the period or year of assessment applicable under the advance ruling. A request to extend the period has to be submitted to the DGIR at least three (3) months prior to the end of the period or year of assessment stated in the advance ruling or any other period approved by the DGIR. If an arrangement is essentially the same as that stated in the advance ruling, the person may make a request to the DGIR that the same interpretation of the provision of the ITA be applied prospectively to another period or year of assessment.
- 11.6 Any typographical or minor errors contained in the advance ruling issued will not affect or make the advance ruling void if these errors do not in any way alter the way the provision of the ITA applies in the advance ruling.
- 11.7 A person who has made an application for an advance ruling is still required to comply with any obligations under the provisions of the ITA. As an example, the person is still required to file his tax return within the stipulated time frame. The issuance of an advance ruling to a person will also not prevent the DGIR to make or amend any assessment under the provisions of the ITA.

12. FINALITY AND DISCLOSURE OF AN ADVANCE RULING

- 12.1 Once an advance ruling is issued, it is considered final irrespective of whether it is advantageous to the person or not. No further correspondence or enquiry will be entertained and no appeal can be made against the advance ruling. In the case of a disadvantageous advance ruling, the person has the choice of not carrying out the proposed arrangement. On the other hand, if the proposed arrangement is effected, then the advance ruling has to be complied with. The applicant can make an appeal objecting to the tax treatment stated in the advance ruling under the normal provision for appeal stated in section 99 of the ITA. That means the objection is against the notice of assessment made.

12.2 A person who has obtained an advance ruling is required to disclose the following information in his relevant income tax return form:-

- a. the existence of an advance ruling;
- b. whether or not he has complied with the advance ruling; and
- c. whether there are any material changes made to the arrangement specified in the advance ruling.

The importance of this disclosure is enforced by penalty that may be imposed for non-compliance with the advance ruling made.

13. WITHDRAWAL OF AN ADVANCE RULING BY THE DGIR

13.1 The DGIR has the power to withdraw an advance ruling at any time after it is issued. This may occur due to changes in the interpretation of the tax laws based on new differing decisions made by the Courts.

13.2 The withdrawal of an advance ruling which has been issued to a person will be made by way of a notification of withdrawal. The date of withdrawal of an advance ruling will not be retrospective and will not be earlier than the date on which the person is reasonably expected to receive the notice of withdrawal.

13.3 If a person has effected the arrangement before the date of withdrawal, then the person is allowed to follow the advance ruling issued to him until the end of the period stated in the advance ruling. On the other hand, if a person has not effected the arrangement at the date of withdrawal, then the advance ruling issued to him is not applicable. This will ensure that a person who begins an arrangement based on the advance ruling issued by the DGIR will bind the DGIR for the period stated in the advance ruling. However, if the DGIR withdraws an advance ruling before the person carries out the arrangement, then the DGIR will not be bound by the advance ruling.

14. ADVANCE RULING CEASING TO APPLY

Where an advance ruling has been issued to a person, it will be binding upon the person and the DGIR subject to the conditions mentioned in paragraphs 4 and 13 of these guidelines. In the circumstance where any provision of the ITA that is applicable to an advance ruling is repealed or amended, then the advance ruling ceases to apply. This may happen if the repeal or amendment of that provision in the ITA is such that it alters the way in which the tax law applies.

The cessation of the application of an advance ruling is from the date the repeal or amendment of the provision takes effect.

15. FEE STRUCTURE

15.1 An applicant who intends to apply for an advance ruling will be charged a fee. The fees will be imposed on each applicant in all circumstances including joint application. The fees imposed are recoverable as a debt due to the Government.

15.2 The fee structure is as follows:-

- a. an application fee of RM500.00 is payable upon application and is non-refundable. The fee charged takes into account the time to determine if the DGIR would accede to the request for the issuance of an advance ruling;
- b. a further fee of RM150.00 per hour or part thereof will be imposed after the first four (4) hours taken to prepare the advance ruling, including any time spent by the DGIR in consultation with the person; and
- c. reimbursement fee in respect of
 - i. any external professional advice sought by the DGIR, with prior consent from the applicant; or
 - ii. any other reasonable costs incurred by the DGIR.

The DGIR will at all times ensure that every effort is made to minimize the fees payable.

15.3 A person who withdraws his application for an advance ruling is still liable to pay all fees incurred up to the time of receipt of the letter of withdrawal by the DGIR.

15.4 With the exception of the non-refundable application fee of RM500.00, the DGIR may in exceptional cases and at his discretion, waive the whole or part of, any amount of fees payable by an applicant for the purpose of providing an advance ruling.

16 PROCESSING TIME OF ADVANCE RULING

In general, an advance ruling application will be dealt with according to the date it is received. The DGIR will ensure that the advance ruling will be issued within the stipulated time frame, that is 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.

17. PUBLICATION OF ADVANCE RULING

All information in an advance ruling is treated as confidential and will not be published in general in any form. If there are similar issues raised by applicants, the DGIR may publish public rulings to make known the interpretation of the DGIR in respect of the issues.

Updated by,

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1 October 2015