

▶▶ Tax Flash



April 2010

Public Ruling No. 1/2010 - Withholding Tax on Income under Paragraph 4(f) (Note)

The Inland Revenue Board ["IRB"] has issued the Public Ruling ["PR"] No. 1/2010 - Withholding Tax ["WT"] on Income under Section 4(f) on 19th April 2010. This Ruling provides clarification, amongst others, the following:-

- i. Effective from 1st January 2009, gains or profits falling under Section 4(f) of the Income Tax Act 1967 ["the Act"] which is derived from Malaysia and received by a non-resident is subject to WT of 10% under Section 109F of the Act.
- ii. The determination of whether a payment made to a non-resident falls under Section 4(f) depends on the facts and circumstances of each case. As a guidance, the criteria which can be considered to determine whether a payment made to a non-resident falls under Section 4(f) of the Act are:-
 - the payment is revenue in nature and not capital in nature;
 - the payment is not an income which falls under Section 4(a) to 4(e) and Section 4A of the Act;
 - the payment received by the non-resident person is in the nature of a miscellaneous or occasional income, which is received outside the ordinary course of trade or vocation of the non-resident;
 - the payment is for an isolated transaction; and
 - there is an absence of repetition of transactions to indicate the commercial nature of the transaction.
- iii. The income received by the non-resident under Section 4(f) that is subject to WT may be in the form of cash or in kind.
- iv. The gains or profits shall be deemed to be derived from Malaysia regardless whether transactions are carried on in Malaysia or not if:-
 - the responsibility for the payment of such gains or profits lies with the Government, a State Government or a local authority;
 - the responsibility for the payment of such gains or profits lies with a person who is a resident for that basis year; or
 - the payment of such gains or profits is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.

Hyperlinks

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Reference

PR No. 1/2010

- v. For the purpose of deducting WT, the effective date for the derivation of income falling under Section 4(f) of the Act is “the date or period when the resident payer is liable to make payment to the non-resident person”. The payment will be subject to WT under Section 109F if such date is on or after 1st January 2009.
- vi. The payer is liable to deduct a 10% WT from the gross amount of payment in relation to gains or profits falling under Section 4(f) of the Act before paying the non-resident. The 10% WT deducted has to be remitted to the IRB within one month from the date of crediting or paying the non-resident pursuant to Section 109F of the Act.
- vii. Where the payer fails to remit the WT due to the IRB within the stipulated period:-
- the amount of WT due shall be increased by 10% and this increased sum together with the WT will be a debt due to the government.
 - no claim for tax deduction is allowed in computing the adjusted business income of the payer unless the payer makes good the payment of WT plus the penalty.
 - the payer may subsequently recover the amount of WT from the non-resident as a debt due to the payer.
- viii. If it is ascertained that the amount payable to the non-resident person is a business income to the recipient, no WT needs to be deducted from the payment to the non-resident person. The documents that should be kept by the payer for audit purposes to substantiate the determination of the nature of payment to the non-resident person would include the following:-
- copy of the business contract or agreement;
 - copy of an auditor’s confirmation that verifies the income derived by the non-resident person is in the ordinary trade or profession of that non-resident person;
 - copy of the non-resident person’s audited accounts;
 - copy of a notice of assessment of the non-resident person; and
 - copy of a business registration or license of the non-resident person.

Copies of the above documents must be certified as true copies by either the issuing agency or a notary public.

Note : *Technically, the word ‘paragraph’ should read ‘section’*



Fourth Addendum to PR No. 2/2004 – Benefits-In-Kind

The IRB has issued the Fourth Addendum to PR No. 2/2004 – Benefits-In-Kind to provide clarification in relation to tax exemption on free petrol benefit received by an employee. In this respect, an employee is given an option to be taxed on free petrol benefit provided by the employer in the following manner :-

- i. based on the annual prescribed value for petrol as provided in Appendix 2 of the PR No. 2/2004 (without any exemption given); or
- ii. based on the actual amount of petrol provided to the employee with exemption limited to :-
 - RM2,400 per year for travelling between home and workplace (only for the year of assessment ["YA"] 2008 to the YA 2010); and
 - RM6,000 per year for travelling in relation to official duties.

A claim for deduction exceeding RM6,000 for official duties can be made by the employee in computing his employment income if proper records in relation to the exempted amount and travelling for official duties are kept.

Where an employer is unable to identify the amount of petrol provided for official duties and that provided for travelling between home and workplace, the exemption will be limited to RM6,000 per year instead of RM8,400 per year.

The above addendum is effective from the YA 2008.

Introduction of GST to be Postponed

The Second Finance Minister, Datuk Ahmad Husni Hanadzlah has announced that the introduction of Goods and Services Tax ["GST"] will be postponed to after year 2011.

Income Tax (Exemption) (No. 5) (Revocation) Order 2010

The Income Tax (Exemption) (No. 5) Order 1989 provides that 70% of the income derived and remitted to Malaysia by a company resident in Malaysia from a construction project carried on outside Malaysia which commenced after 21st October 1988 is exempted from tax.

Fourth Addendum to
PR No. 2/2004

Income Tax (Exemption)
(No.5) (Revocation) Order
2010

With the introduction of paragraph 28, Schedule 6 of the Act to exempt the income of any person, other than a resident company carrying on the business of banking, insurance or sea or air transport derived from sources outside Malaysia and received in Malaysia with effect from the YA 2004, 100% of the income derived and remitted to Malaysia by a company resident in Malaysia from a construction project carried on outside Malaysia will be effectively exempted from tax. In this instance, the Income Tax (Exemption) (No.5) (Revocation) Order 2010 was gazetted recently to revoke the Income Tax (Exemption) (No. 5) Order 1989.

The above revocation order is deemed to have come into operation from the YA 2004.

DTA between Malaysia and Germany

Malaysia has recently signed a new Double Tax Agreement ["DTA"] with Germany on 23rd February 2010. Salient points of the DTA include:-

- i. A building site, a construction, installation or assembly project will constitute a permanent establishment if it exists for more than 9 months.
- ii. A permanent establishment is also deemed to exist if supervisory activities are carried out in connection with a building site, a construction, installation or assembly project for more than 6 months.
- iii. The royalty article has been expanded to include technical services fees on which WT of 7% will be applicable when the new treaty comes into force.
- iv. The WT rates applicable on certain payments made to non-residents are as follows :-
 - Dividends - 5% if the beneficial owner is a company (other than a partnership) which holds directly at least 10% of the shareholding or 15% in all other cases
 - Interest - 10%. Penalty charges for late payment are not considered as interest.
 - Royalties and fees for technical services - 7%
 - Section 4(f) income - 0%
- v. The Labuan entities will not be entitled to the benefits under this treaty unless election is made by such companies to be charged to tax under the Act.

The new DTA has yet to be gazetted or ratified.

DTA between Malaysia and Brunei Darussalam

The DTA signed between Malaysia and Brunei Darussalam has recently been gazetted. Salient points of the DTA include :-

- i. A building site or construction, installation or assembly project or supervisory activities carry out in connection therewith which exists for more than 6 months will constitute a permanent establishment.
- ii. The WT rates applicable on certain payments made to non-residents are as follows :-
 - Dividends - 10%
 - Interest - 10%. Penalty charges for late payment are not considered as interest
 - Royalties - 10%
 - Technical fees - 10%
 - Section 4(f) income - 10%

The above DTA will enter in force upon ratification.

DTA between Malaysia and Brunei Darussalam

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