

# Tax Flash



June 2012

## PR No. 2/2012 – Foreign Nationals Working in Malaysia – Tax Treaty Relief

The Inland Revenue Board ["IRB"] has recently issued the Public Ruling ["PR"] No. 2/2012 – Foreign Nationals Working in Malaysia – Tax Treaty Relief. This PR provides guidance on the application of tax treaty relief to foreign nationals from treaty countries seconded to Malaysia by their employers that are not resident in Malaysia.

Salient points of the abovementioned PR include:-

### i. Tax Treaties / Tax Treaty Relief

- When a foreign national who is a resident of another country derives employment income from Malaysia, income tax may be payable in Malaysia and the country of residence.
- For foreign nationals exercising employment in Malaysia due to a secondment, the Dependent Personal Services ["DPS"] Article in the double tax agreement ["DTA"] is applicable for tax treaty relief although the precise terms in DPS Article in each DTA may vary from country to country.
- Generally, for a non-resident foreign national exercising employment in Malaysia for short term purposes, tax exemption on employment income will be granted in Malaysia if all of the following three (3) conditions are satisfied:-
  - he is present in Malaysia for a period or periods not exceeding 183 days in aggregate in the fiscal / calendar year concerned or in any 12 month period commencing or ending in the fiscal year concerned;
  - his remuneration in Malaysia is paid by or paid on behalf of an employer who is not a resident in Malaysia; and
  - his remuneration is not borne by a permanent establishment ["PE"] or a fixed base which the foreign employer has in Malaysia, i.e. the remuneration is not charged as a deductible expense in the income statement of the PE which the foreign employer has in Malaysia.

### Hyperlinks

Advent Consulting Group  
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### References

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ii. Documents Required for Tax Treaty Relief Claim

Documents required include:-

- Certificate of Residence from the tax authority of the other country overseas to prove the residence status of non-resident foreign nationals for each year concerned.
- Certified true copy of the foreign national's passport and a listing of the entry and exit dates to / from Malaysia to determine the number of days of physical presence in Malaysia.
- Written confirmation from the employer in the other country overseas regarding:-
  - who bears the remuneration of the foreign national; and
  - reimbursement of cost of remuneration
- Written confirmation from the company resident in Malaysia or the PE in Malaysia regarding:-
  - who bears the remuneration of the foreign national; and
  - reimbursement of cost of remuneration

**PR No. 3/2012 – Appeal Against an Assessment**

The IRB has recently issued the PR No. 3/2012 – Appeal Against an Assessment. This PR provides guidance on the procedure for appealing against assessments made or deemed made and the requirements to be complied with when making appeals.

PR No. 3/2012

Salient points of the abovementioned PR include:-

i. Right of Appeal and Time to Appeal

- A person who is dissatisfied with an assessment that has been made, or deemed made, on him by the Director General ["DG"] has a right to appeal against that assessment by submitting Form Q not later than 30 days after the date of service of the notice of assessment or the deemed notice of assessment is deemed to have been served.
- The person making an appeal (the appellant) shall need to submit Form Q (1 original copy and 3 photocopies) to the IRB for each year of assessment.
- In the case of an advance assessment, the appeal must be made within the first 3 months of the year of assessment following the year of assessment for which the assessment is made.



## ii. Appeal Against Notification of Non-Chargeability

- A notification of non-chargeability is deemed to be a notice of assessment and forms the basis of appeal to The Special Commissioners of Income Tax ["SCIT"].
- An appeal must be made within 30 days from the date of the notification of non-chargeability.

## iii. Late Appeal

- If an appeal cannot be submitted within the specified period, application for extension of time for appeal could be made by submitting Form N (1 original copy and 1 photocopy) for each year of assessment. Reasons for application for extension of time should be given.
- If the extension of time is granted, the IRB will issue Form CP15A to inform the appellant of the new extended date of submission of Form Q, which is normally 30 days from the date of the Form CP15A.
- If extension of time is not granted, Form N, together with a statement by the DG giving reasons for rejection, will be submitted to the SCIT. The appellant will be notified in writing and a copy of the DG's statement will be attached.
- Within 21 days of receiving of the notification, the appellant may make written representation to the SCIT in respect of his application and the statement by the DG.
- If the SCIT agrees to give extension of time, the appellant will be notified by the SCIT of the new extended date of submission of Form Q.
- If extension of time is not granted, the appellant will be notified by the SCIT of its decision and the appellant has no right of further appeal.

## iv. Grounds of Appeal

- The grounds of appeal should be specific, referring to particular items in the tax computation or the notice of assessment with which the appellant disagrees.
- Where the grounds of appeal are found to be vague or lacking in details, the review of the assessment could not be carried out. The appeal will be forwarded to the SCIT without a review of the assessment.



## v. Review of Assessment

- A review of assessment under appeal will be made as soon as the Headquarters of the IRB receives the Form Q from the branch. Further information or evidence may be requested by the IRB from the appellant.
- As a result of the review, a proposal may be made to the appellant to settle the appeal by confirming, reducing, increasing or discharging the assessment.
- The case will be forwarded to the SCIT if it appears that an agreement could not be reached.

## vi. Disposal of Appeal

- The appellant will be notified in writing when the Form Q is forwarded to the SCIT.
- The appellant and the DG can still negotiate to reach an agreement, or the appellant can withdraw the appeal, at any time before the hearing.

## vii. Representation

- The appellant can be represented by a lawyer and /or a tax agent at the hearing.

## **Income Tax (Transfer Pricing) Rules 2012**

The IRB has issued the Income Tax (Transfer Pricing) Rules 2012 which shall apply to transactions for the acquisition or supply of property or services between related parties in pursuance to Section 140A of the Income Tax Act 1967 ["the Act"].

The Rules emphasise on the mandatory transfer pricing ["TP"] documentation requirement and the application of the arm's length price for the acquisition or supply of property or services for controlled transactions in accordance with the specified method and manner provided.

Salient points of the above Rules include:-

### i. Contemporaneous TP Documentation

- A person who enters into a controlled transaction shall be required to prepare a contemporaneous TP documentation which shall include records and documents that provide a description on the following matters:-



- organisational structure, including an organisation chart covering persons involved in a controlled transaction;
  - nature of the business or industry and market conditions;
  - the controlled transaction;
  - strategies, assumptions and information regarding factors that influenced the setting of any pricing policies;
  - comparability, functional and risk analysis;
  - selection of the transfer pricing method;
  - application of the transfer pricing method;
  - documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis;
  - index to documents; and
  - any other information, data or document considered relevant by the person to determine an arm's length price.
- Contemporaneous TP documentation is the TP documentation to be prepared when a person is developing or implementing any controlled transaction. Where there are any material changes related to the controlled transaction in a basis period for a year of assessment under review, the contemporaneous TP documentation shall be updated prior to the due date for furnishing a return for the basis period for that year of assessment.
- ii. Method to Determine Arm's Length Price
- The preferable methodologies to be applied in determining arm's length price are the traditional transactional methods ["TTM"], i.e. comparable uncontrolled price ["CUP"] method or the resale price method or the cost plus method.
  - If the above methods cannot be reliably applied or applied at all, the transactional profit methods ["TPM"], i.e. profit split method or the transactional net margin method can be adopted.
  - If both TTM and TPM cannot be applied at all, other methods which provide the highest degree of comparability between the transactions may be allowed.
- iii. Comparability of Transactions
- To determine the arm's length price of a controlled transaction, an uncontrolled transaction (i.e. a transaction carried on by independent person dealing with one another at arm's length) shall be used as a comparable.
  - The comparability factors to be considered in determining the arm's length price include:-
    - the characteristics of the property or services;
    - the functions performed, assets employed and the risk assumed by the respective persons in the transactions;
    - the contractual terms;
    - economic circumstances; and
    - business strategies of the persons in the transactions.



#### iv. Intra-group Services

- In the determination of the arm's length price for intra-group services, a person in a controlled transaction shall need to demonstrate that:-
  - the services have been rendered and the provision of such services has conferred an economic benefit or commercial value to his business; and
  - the charge is justified
- Any charge for intra-group services shall be disregarded if it involves:-
  - shareholders or custodial activities;
  - duplicative services;
  - services that provide incidental and passive association benefits; or
  - on-call services

#### v. Cost Contribution Arrangement

- Where a person enters into a cost contribution arrangement with its associated person to share the costs and risks for acquisition or supply of property or services, the allocation of costs for such arrangement and any payment in respect of entry, withdrawal or termination by any person shall be determined in line with the arm's length principle.

#### vi. Intangible Property

- In a controlled transaction, where an intangible property (includes patent, invention, formula, process, design, model, plan, trade secret, know-how or marketing intangible) is sold or licensed out, the arm's length price for such sale or license shall be determined by applying the CUP method.
- The value of that property to the purchaser of licensor shall be the benefit that the intangible property is expected to generate and in the case where the property is highly valuable or unique, the residual profit split method shall be applied.
- Other methods may be allowed if the method provides the highest degree of comparability between transactions.

#### vii. Interest on Financial Assistance

- Any person in a controlled transaction who provides or receives financial assistance (includes loan, interest bearing trade credit, advance or debt and the provision of any security or guarantee), directly or indirectly, to or from another person with or without consideration shall determine the arm's length interest rate for such assistance.

viii. Adjustment by the DG

- Where the DG has reason to believe that any price or interest rate imposed in a controlled transaction is not at arm's length, he may make an adjustment to reflect the arm's length price or interest rate for the transaction.
- Any adjustment under these Rules in respect of an assessment made on one of the persons in a controlled transaction may be reflected by an offsetting adjustment on the assessment of the other person in that transaction upon request by that other person.

ix. PE as a Separate Entity

- A PE shall be treated as a distinct and separate entity from its head office and related branches.

For the purposes of these Rules:-

“property” includes any goods, movable or immovable thing, or intangible property and beneficially owned property;

“service” includes any rights, benefits, privileges or facilities that are, or to be, provided, granted or conferred under an arrangement for or in relation to any work and assistance including financial assistance.

The above Rules are deemed to have come into operation on 1<sup>st</sup> January 2009.

**Income Tax (Advance Pricing Arrangement) Rules 2012**

Pursuant to the Income Tax (Advance Pricing Arrangement) Rules 2012, a taxpayer who carries on a cross-border transaction may apply to the DG for an advance pricing arrangement [“APA”], i.e. an arrangement made to determine in advance the appropriate set of criteria to ascertain the arm's length transfer prices of a covered transaction, in accordance with Section 138C of the Act. The Rules provide the framework and procedures in relation to APA.

Salient points of the above Rules include:-

i. Request for Pre-filing Meeting

- A taxpayer shall make a request in writing to the DG for a pre-filing meeting in respect of an APA 12 months prior to the first day of the proposed covered period (i.e. the basis period for a year of assessment covered under the APA).

- The request must be submitted together with a draft outline of the case consisting of:-
    - the taxpayer's business model and industry information;
    - the scope of the transaction and periods to be covered; and
    - the proposed TP methodology and an explanation of whether the method accords with the arm's length principle.
  - Within 14 days after the pre-filing meeting, the DG shall notify the taxpayer of his decision on whether the taxpayer may proceed to submit an application for an APA.
- ii. Submission of Application for Arrangement
- A taxpayer may submit an application for Unilateral APA (provided under Section 138C of the Act), Bilateral APA or Multilateral APA (both provided under Section 132 of the Act) in a prescribed form within 2 months after receipt of the notification of decision from the DG.
- iii. Circumstances where APA is Declined
- The DG may decline an application for an APA under the following circumstances:-
    - failure to comply with the requirements under the Income Tax (Transfer Pricing) Rules 2012 and the Malaysian Transfer Pricing Guidelines issued by the DG;
    - where the proposed covered transaction is based on a hypothetical situation or not seriously contemplated;
    - where it appears to be an inefficient use of resources to pursue an APA if the proposed transaction is limited in nature and value, or the arm's length principle on the proposed transaction can reliably be applied without material doubt;
    - where the matter on which the APA is sought is subject to an appeal under Section 99 of the Act; or
    - where the proposed covered transaction involves a tax avoidance scheme.
  - Within 30 days after receipt of the decision from the DG to decline the application for an APA, the taxpayer may make a representation to the DG for a further review of the application and the decision by the DG on the representation is final.
- iv. Withdrawal of APA Application
- A taxpayer may withdraw an APA application at any time before the arrangement is concluded by giving a notice in writing to the DG.



## v. Critical Assumption

- In the application for an APA, the taxpayer shall identify the assumptions made in developing the proposed TP methodology which are critical to the reliability of the methodology under the arm's length principle.

## vi. Effect of APA

- The Unilateral APA, Bilateral APA or Multilateral APA entered into between the DG and taxpayer shall, during the covered period, constitute a binding undertaking on the parties to the arrangement that the transfer price has been ascertained for the covered transaction.

## vii. Covered Period under APA

- The covered period shall be for a period of 3 to 5 years of assessment.

## viii. Request for Rollback

- A taxpayer may request for a rollback i.e. the application of the terms and conditions of an APA to prior years' assessment if the proposed TP methodology is relevant to the resolution of the TP issues in prior years and the facts and circumstances surrounding the prior years are substantially the same.

## ix. Compensating Adjustments

- Where the results of the covered transaction are materially different from the APA, the taxpayer shall make a compensating adjustment to ensure that the results of the covered transaction substantially conform to the results that would have been arrived at if the TP methodology agreed to under the APA is applied.

## x. Compliance Report

- The taxpayer shall furnish a compliance report for each year of assessment of the covered period within 7 months from the date following the close of accounting period.

## xi. Revision of APA

- The DG may revise an APA if:-
  - the taxpayer fails to meet the critical assumptions as provided in the arrangement; or
  - there has been a change in the law or the arrangement under Section 132 of the Act that affects the APA.

xii. Cancellation of APA

- The DG or the Competent Authority, as the case may be, may cancel an APA under any of the following circumstances:-
  - if any of the person in the covered transaction in respect of that arrangement:-
    - fails to comply with any terms and condition of that APA;
    - makes an error or mistake in the APA application, reports or renewal submissions;
    - fails to provide information, documentation and compliance report as required; or
  - if the revised APA is not concluded.
- The taxpayer may apply to the DG for cancellation of the APA on reasonable grounds.

xiii. Revocation of APA

- The DG or the Competent Authority, as the case may be, may revoke an APA if any of the persons in the covered transactions makes any misrepresentation, fraud, omission or makes statements that are false or misleading in the APA application, reports or renewal submission.

xiv. Renewal of APA

- A taxpayer may request for a renewal of an APA not later than 6 months before the expiration of that arrangement by submitting the appropriate supporting documentation.

The above Rules are deemed to have come into operation on 1<sup>st</sup> January 2009.

### **Tax Exemption on Shipping Profits**

With the gazette of the Finance Act 2012 on 9 February 2012, the tax exemption on income of shipping companies derived from the operation of Malaysian ships shall be reduced from 100% to 70% (effective year of assessment ["YA"] 2012) of statutory income as proposed in the Budget 2012 announcement.

Following the lobbying by the Malaysian Shipowners' Association, the Ministry of Finance has deferred the above reduction in the tax exemption and granted a full exemption (100%) of statutory income pursuant to the Income Tax (Exemption) (No. 2) Order 2012.

The above Order shall have effect from the YA 2012 until YA 2013.



## **Double Deduction for Expenditure Incurred for the Provision of an Approved Internship Programme**

Following the 2012 Budget announcement and the Guidelines on Structured Internship Programme issued by Talent Corporation Malaysia Berhad ["TalentCorp"], the Income Tax (Deduction for Expenditure Incurred for the Provision of an Approved Internship Programme) Rules 2012 have been gazetted to allow double deduction for expenditure incurred by a resident person for the provision of an approved internship programme in Malaysia conducted for a minimum of period of 10 weeks as approved by TalentCorp in collaboration with the Ministry of Higher Education as follows:-

- i. internship monthly allowance of not less than RM500 paid to the students;
- ii. expenditure incurred for the provision of training to the students;
- iii. expenditure incurred on meal, travelling and accommodation for the students during the internship programme; and
- iv. fee paid to a person who has been appointed to conduct an approved internship programme.

The total amount of deduction allowable under (ii), (iii) and (iv) above for each student is restricted to RM5,000 for a year of assessment. A letter from TalentCorp confirming that the internship programme conducted is an approved internship programme is required in support of the above double deduction claim.

The above Rules shall have effect from the YA 2012 until YA 2016.

**Note :** For further information on the Guidelines on Structured Internship Programme, kindly refer to our Tax Flash - January 2012 issue.

## **Double Deduction for Participation in an Approved Career Fair**

Following the 2012 Budget announcement, the Income Tax (Deduction for Participation in an Approved Career Fair) Rules 2012 have been gazetted to allow double deduction for expenditure incurred by a resident person for participation in a career fair held outside Malaysia organised or endorsed by TalentCorp and approved by the Minister.

Expenditure incurred for an approved career fair qualifying for double deduction are:-

- i. Overseas travelling expenses incurred by a person or representative of that person (not more than 3 including that person), limited to:-
  - economy class air fare;
  - RM300 per day for accommodation; and
  - RM150 per day for sustenance.

Income Tax (Deduction for Expenditure Incurred for the Provision of an Approved Internship Programme) Rules 2012

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- ii. Marketing and promotional materials (e.g. pamphlets, prints and banners) which contain specific information relating to the approved career fair.
- iii. Payment to the organiser of an approved career fair.
- iv. Other expenses directly incurred for participating in the approved career fair.

A letter from TalentCorp confirming that the career fair is an approved career fair is required in support of the above double deduction claim.

The above Rules shall have effect from the YA 2012 until YA 2016.

### **Preferential Tax Rate for an Approved Individual under Returning Expert Programme**

Following the 2012 Budget Announcement, the Income Tax (Determination of Approved Individual and Specified Year of Assessment under the Returning Expert Programme) Rules 2012 have been gazetted to provide an option for the chargeable income of an approved individual in respect of employment with any person resident in Malaysia during the specified years of assessment ascertained in accordance with a prescribe formula to be taxed at a flat rate of 15%. The employment must commence on or after 1<sup>st</sup> May 2011.

The balance of chargeable income of that approved individual shall be charged to tax under the graduated rates that would have been applicable for his chargeable income if he had not been an approved individual under these Rules.

An “approved individual” means an individual who:-

- is a Malaysian citizen and resident in Malaysia;
- has made an application under the Returning Expert Programme and approved by the Minister to be subject to tax at a rate of 15% and such application must be made on or after 12<sup>th</sup> April 2011 but not later than 31<sup>st</sup> December 2020;
- is an expert in a field specified by the Minister;
- has not derived any employment income in Malaysia for at least a continuous period of 36 months prior to the date of application;
- has never been approved under these Rules.

“specified years of assessment” means:-

- 5 consecutive years of assessment commencing from the basis period of a year of assessment an option is made by an approved individual to be subject to tax at a flat rate of 15%; and
- the option shall be made in the year of assessment or the following year of assessment of the approved individual’s return to Malaysia.

“Returning Expert Programme” means a programme managed by TalentCorp and approved by the Government.

The above Rules shall have effect from the YA 2012.

Income Tax  
(Determination of  
Approved Individual and  
Specified Year of  
Assessment under the  
Returning Expert  
Programme) Rules 2012



## **GST – Draft Guides**

The Royal Malaysian Customs has recently issued the following draft guides:-

- i. Goods and Services Tax ["GST"] Registration Guide to provide information pertaining to the requirement and procedure for registration for GST.
- ii. GST Guide on Tax Invoice and Record Keeping to provide clarification on tax invoice, credit and debit notes including records keeping requirements under the GST legislations, relating to supplies made or received by the GST registered person.

GST Registration Guide

GST Guide – Tax Invoice and Record Keeping

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