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PR No. 1/2020 – Tax Incentives for BNX

The Inland Revenue Board [“IRB”] has recently issued the *Public Ruling [“PR”] No. 1/2020 – Tax Incentives for BioNexus Status Companies [“BNX”]* to replace the PR No. 8/2018 issued on 9th October 2018. This new PR provides guidance on the tax treatment of tax incentive for a BNX in Malaysia with incorporation of updates provided in the following gazette orders to adhere to the requirements of the Forum on Harmful Tax Practice [“FHTP”] initiated by the Organisation for Economic Co-operation and Development:-

- [Moore Malaysia](#)
- [Moore Global](#)
- [Inland Revenue Board](#)

- Income Tax (Exemption) (No. 17) 2007 (Amendment) Order 2018; and
- Income Tax (Exemption) (No. 2) 2009 (Amendment) Order 2018.

Generally, the contents of the new PR are similar to the previous PR in providing clarification on the following 3 types of tax incentives available to a BNK:-

- tax exemption on statutory income;
- further exemption; and
- industrial building allowance,

with the incorporation of the requirements of substantial activities, exclusion of income from intellectual property ["IP"] right from tax incentive and grandfathering rules for existing BNK that is already enjoying tax incentive in compliance with the requirements of FHTP mentioned above.

Significant changes made to the new PR include:-

- i. **"IP right"** means a right arising from any patent, utility innovation and discovery, copyright, trade mark and service mark, industrial design, layout-design of integrated circuit, secret processes or formulae and know-how, geographical indication and the grant of protection of a plant variety and other like rights, whether or not registered or registrable.
- ii. **"New IP right"** means an intellectual property right in relation to the qualifying activity ["QA"] of the BNK that:-
 - comes into the ownership of the BNK on or after 1st July 2018; or
 - comes into the ownership of the BNK after 16th October 2017 but before 1st July 2018 as a result of an acquisition by the BNK, directly or indirectly, from a related company.
- iii. **"Qualifying activity"** means an activity as set out in the Schedule of P.U. (A) 371/2007 and approved by the Minister, and the activities are:-
 - industrial biotechnology;
 - healthcare biotechnology; and
 - agricultural biotechnology.
- iv. **Substantial Activities**
 - The **substantial activities requirements** that have to be satisfied in carrying on a QA in order to enjoy the tax incentive are as follows:-
 - has an approved adequate number of full time employees and knowledge workers in Malaysia; and
 - incurs an approved adequate amount of annual operating expenditure or an approved adequate investment in fixed asset in Malaysia.
 - An application must be submitted to the Bioeconomy Corporation in relation to the substantial activities requirements in order to enjoy the tax incentives.
- v. **Grandfathering Rules**
 - **Grandfathering rules** have been provided for existing BNK that currently enjoying a tax exemption, for commencement of the implementation of the substantial activities requirements.
 - Application must be submitted to the Bioeconomy Corporation not less than 6 months before the first day of the basis period of the year of assessment in which the substantial activities requirement takes effect, in order for the BNK continue enjoying the exemption after the grandfathering rules end.
 - The dates of commencement of application of the substantial activities requirements are as follows:-
 - Effective 1st July 2021
 - where a BNK has been granted an exemption on or before 16th October 2017, the substantial activities requirements shall not apply until 30th June 2021, i.e. such BNK would have to fulfill the substantial activities requirements from 1st July 2021 onwards.

- Effective 1st January 2019
 - where a BNX carries on a new QA or granted an exemption after 16th October 2017, the substantial activities requirements shall not apply until 31st December 2018, i.e. such BNX would have to fulfill the substantial activities requirements from 1st January 2019 onwards.

vi. **Exclusion of IP Income from Tax Incentive**

- Royalty and other income derived from IP rights are excluded from the scope of tax exemption. The commencement dates of the exclusion of IP income are as follows:-
 - Effective from 1st July 2018 until 30th June 2021
 - royalties and other income derived from **new IP** rights that the BNX owns or is the licensee of the right.
 - Effective 1st July 2021
 - royalties and other income derived from **all IP** rights that the BNX owns or is the licensee of the right.
- The IP income excluded above is subject to tax under the Income Tax Act 1967 [“the Act”].

Note: For further information on the Income Tax (Exemption) (No. 17) 2007 (Amendment) Order 2018 and Income Tax (Exemption) (No. 2) 2009 (Amendment) Order 2018, kindly refer to our [Tax Flash – February 2019 issues](#). For further information on the previous PR No. 8/2018, kindly refer to our [Tax Flash – October 2018 issue](#).

Guidelines on the Application of Sections 12(3) and 12(4) of the Act in Determining a “Place of Business”

Following the Budget 2019 announcement, the IRB has recently issued the [Guidelines on the Application of Sections 12\(3\) and 12\(4\) of the Act in Determining a “Place of Business”](#). The said guidelines provide clarification in the determining the “Place of Business” of a person in Malaysia in accordance with Sections 12(3) and 12(4) of the Act which takes effect from 28th December 2018.

Salient points of the abovementioned guidelines are as follows:-

i. Application of Section 12(3) and 12(4) of the Act

- Section 12(3) of the Act states that the income of a person from a business that is attributable to a place of business in Malaysia shall be deemed to be the gross income of that person derived from Malaysia from the business.
- Section 12(4) of the Act provides that a “place of business” includes:-
 - a place of management;
 - a branch;
 - an office;
 - a factory;
 - a workshop;
 - a warehouse;
 - a building site, or a construction, an installation or an assembly project;
 - a farm or plantation; and
 - a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
- Pursuant to Section 12(4) of the Act, a person shall also be deemed to have a place of business in Malaysia if that person:-
 - carries on supervisory activities in connection with a building or work site, or a construction, an installation or an assembly project; or
 - has another person acting on his behalf who:-
 - habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification;
 - habitually maintains a stock of goods or merchandise in that place of business of the person from which such person delivers goods or merchandise; or
 - regularly fills orders on behalf of the person.

ii. Physical “Place of Business”

- A place of business exists where the person has access to use to carry on its business activity, regardless of whether the place is owned or rented by that person.
- The place of business must be fixed whereby two critical components would be considered:-
 - duration test – certain degree of permanence at geographical point i.e. even though only for a very short period of time because of the nature of business;
 - location test – specific geographical point depends on commercial or geographical coherence factors such as a mine, where activities may vary from one location to another.

iii. Preparatory or Auxiliary

- An activity which is preparatory or auxiliary refers to an activity that is carried out at a physical place but is by itself not sufficient to constitute a place of business. Activities of preparatory or auxiliary in nature include the following characters such that they are:-
 - remote from the actual realization of profit of the business;
 - in itself do not form an essential and significant part of the activity of that business;
 - are not identical to the general purpose of the whole business; or
 - are usually carried out during a relatively short period.
- However, if the preparatory or auxiliary activity constitutes complementary functions that are part of a cohesive business operation that is carried out by the non-resident and its associated person, such activity would not be regarded as preparatory or auxiliary.

iv. Building site, Construction, Installation, Assembly and Supervisory Activity

- A person is considered to have a place of business if it has carried on activities at the site or project for a period or periods exceeding 5 months in aggregate in any 12 month-period.
- The withholding tax provisions to be applied to payments to non-residents in relation to the above projects and related supervisory activities are as below:-
 - Section 107A of the Act if the duration exceeds 5 month-period; and
 - Section 109B of the Act if the duration does not exceed 5 month-period.

v. Agents as “Place of Business”

- A non-resident principal is deemed to have a place of business in Malaysia if the person has another person (agent) acting on his behalf who:-
 - habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification
 - types of contracts covered include those which are in the name of the principal or which are binding on the principal even if those contracts are not in the name of the principal
 - habitually maintains a stock of goods or merchandise in that place of business from which such person delivers goods or merchandise or regularly fills orders on his behalf
 - these activities only create a place of business for the non-resident principal if the agent also conducts sales related activities.

Every person who is liable to tax is required to declare his income to the IRB.

Operational Guidelines No. 2/2020 – Tax Revision in the 3rd Month that Falls in the Calendar Year 2020 and Deferment of Tax Instalment Payment under the 2020 Economic Stimulus Package

The IRB has recently issued the *Operational Guidelines No. 2/2020 – Tax Revision in the 3rd Month that Falls in the Calendar Year 2020 and Deferment of Tax Instalment Payment under the 2020 Economic Stimulus Package* (available in *Bahasa Malaysia*) to provide clarification on:-

- Revision of Tax Estimate in the month of 3rd instalment;
- Deferment of 6 months’ tax instalment payments for tourism sector; and

- Deferment of 3 months' tax instalment payments for small and medium enterprises ["SME"] and taxpayers who are resident (other than companies).

Salient points of the abovementioned Operational Guideline are as follows:-

- i. Revision of Estimate of Tax Payable (CP204) in the Month of 3rd Instalment
 - Companies, limited liability partnerships, co-operative societies and trust bodies are allowed to revise estimate of tax payable (CP204) in the month of 3rd instalment that falls in the calendar year 2020
 - This revision of estimate of tax payable is not restricted to the basis period for 2020 only
 - Application for revision of CP204 outside the 3rd tax instalment month will not be processed by the IRB. However, revision of tax estimate can still be done in the 6th and/or 9th month of the basis period
 - Application for revision of tax estimate in the month of 3rd instalment will be approved automatically provided that the application is complete
 - Penalty for under estimation of tax under Section 107C(10) of the Act will apply if the difference between the actual tax payable and the estimate exceeds 30% margin allowed
 - Those entities given the deferment of payments are also eligible to make a variation of tax estimate in the 3rd tax instalment month
- ii. Deferment of 6 Months of Tax Instalments (CP204) for Tourism Sector
 - Companies in the tourism sector are allowed to defer 6 months of tax instalment payments under CP204 commencing from 1st April 2020 until 30th September 2020
 - Deferment of tax instalments will be given automatically and no application is required to be made
 - Entities in the tourism sector are still eligible for the deferment even though they are carrying on other businesses
 - The eligibility for the deferment is given based on MSIC code furnished to the IRB in the tax return form
- iii. Deferment of 3 Months of Tax Instalments (CP204) for SME
 - SME are allowed to defer 3 months of tax instalment payments under CP204 commencing from 1 April 2020 until 30 June 2020
 - The business criteria to qualify as SME status are:-
 - have paid up ordinary share capital of not exceeding RM2.5million at the beginning of the basis period for a year of assessment; and
 - have gross income from business not exceeding RM50 million.
 - Deferment of tax instalments will be given automatically by the IRB to eligible SME.
- iv. Deferment of 3 Months of Tax Instalments (CP500) for Taxpayers who are resident (other than Companies)
 - Taxpayers who are resident (other than Companies) are eligible for deferment of instalment commencing from 1st April 2020 until 30th June 2020, i.e. instalments for March 2020 and May 2020
 - Deferment of tax instalments will be given automatically by the IRB based on IRB's records

Tax Audit Framework

The IRB has uploaded the [English version of the Tax Audit Framework](#) issued on 15th December 2019 which was previously only available in *Bahasa Malaysia*.

Note: For further information on the Tax Audit Framework, kindly refer to our [Tax Flash – January 2020 issue](#).

Petroleum Tax Audit Framework

The IRB has uploaded the [English version of the Petroleum Tax Audit Framework](#) issued on 15th December 2019 which was previously only available in *Bahasa Malaysia*.

Note: For further information on the Petroleum Tax Audit Framework, kindly refer to our [Tax Flash – January 2020 issue](#).

Transfer Pricing Audit Framework

The IRB has uploaded the [English version of the Transfer Pricing Audit Framework](#) issued on 15th December 2019 which was previously only available in *Bahasa Malaysia*.

Note: For further information on the Transfer Pricing Audit Framework, kindly refer to our [Tax Flash – January 2020 issue](#).

Tax Exemption on Withdrawal from a PRS

Following the *Prihatin Rakyat* Economic Stimulus Package announcement, the [Income Tax \(Exemption\) \(No. 3\) Order 2020](#) has recently been gazetted to allow an individual exemption from payment of income tax before reaching the age of 55 in respect of withdrawal from a Private Retirement Scheme [“PRS”] contracted for by the individual with the PRS provider approved under Section 139Q of the Capital Markets and Services Act 2007, for the period from 30th April 2020 to 31st December 2020. As such, the withholding tax provision under Section 109G of the Act will not be applicable on such withdrawal made by the individual from the PRS.

The total amount of the exemption granted is subject to a maximum of RM1,500 withdrawn from each PRS provider.

The above Order shall have effect from the year of assessment [“YA”] 2020.

Deduction for Expenses in Relation to Secretarial Fee and Tax Filing Fee

Following the 2020 Budget announcement, the [Income Tax \(Deduction for Expenses in Relation to Secretarial Fee and Tax Filing Fee\) Rules 2020](#) has been gazetted to allow a deduction on the following expenses in ascertaining the adjusted income of a person resident in Malaysia from his business in the basis period for a year of assessment:-

- i. Secretarial fee charged in respect of secretarial services provided by a company secretary registered under the Companies Act 1965 to comply with the statutory requirements under that Act which is incurred and paid by the person in the basis period for that year of assessment; and
- ii. Tax filing fee charged by:-
 - a tax agent approved under the Act in respect of the preparation and submission of return in the prescribed form for the purposes of Sections 77, 77A, 77B, 83 and 86 of the Act for the basis period immediately preceding year of assessment and preparation and submission of prescribed forms for the purposes of Section 107C of the Act;
 - a person who provides services in respect of the preparation and submission of return in the prescribed form for the purposes of:-
 - Section 26 of the Sales Tax Act 2018;
 - Section 26 of the Service Tax Act 2018;
 - Section 19 of the Departure Levy Act 2019; and
 - Section 19 of the Tourism Tax Act 2017,which is incurred and paid by the person in the basis period for that year of assessment.

The total amount of deduction allowed is subject to a maximum amount of RM15,000 per year.

The above Rules shall have effect from YA 2020 and the Income Tax (Deduction for Expenses in Relation to Secretarial Fee and Tax Filing Fee) Rules 2014 is revoked.

Stamp Duty Exemption on Loan or Financing Facility between SME and Financial Institutions under the 2020 Economic Stimulus Package

The *Stamp Duty (Exemption) Order 2020* has been gazetted to provide exemption from stamp duty in relation to the loan or financing facility between a SME and a financial institution, on application.

Application for the above exemption shall be accompanied by a letter of offer from the financial institution to the SME which states the approval of the loan or financing facility.

For the above purposes, "SME" means enterprises as determined by the National Small and Medium Enterprises Development Council established under Section 2A of the Small and Medium Industries Development Corporation Act 1995.

The above exemption applies to the instrument of loan or financing agreement which is executed pursuant to a letter of offer issued by the financial institution on or after 27th February 2020 but not later than 31st December 2020.

Stamp Duty Exemption for Restructuring or Rescheduling of Business Loan or Financing under the 2020 Economic Stimulus Package

The *Stamp Duty (Exemption) (No. 2) Order 2020* has been gazetted to provide exemption from stamp duty for restructuring or rescheduling of a business loan or financing between a borrower or customer and a financial institution, on application.

The exemption of stamp duty is granted on the conditions that: -

- The terms and conditions of the existing instrument of loan or financing agreement must have been duly stamped under item 22 or item 27 of the First Schedule to the Stamp Act 1949; and
- Application for exemption must be accompanied by an offer letter from the financial institution to the borrower or customer for the restructuring or rescheduling of the loan or financing.

The above exemption applies to the instrument of loan or financing agreement relating to the restructuring or rescheduling of loan or financing which is executed on or after 1st March 2020 but not later than 31st December 2020.

Stamp Duty Exemption on Transfer of Property to Trustee of REIT or PTF

Pursuant to the Stamp Duty (Exemption) (No. 4) Order 2004, exemption from stamp duty is granted on all instruments of transfer of real property to a Real Estate Investment Trust ["REIT"] or a Property Trust Fund ["PTF"] approved by the Securities Commission.

The *Stamp Duty (Exemption) (No. 4) Order 2004 (Amendment) Order 2020* has recently been gazetted to provide exemption from stamp duty on all instruments of transfer of real property to a trustee (being the registered owner of the property of the REIT or PTR) approved by the Securities Commission.

The above amendment Order is deemed to have come into operation on 13th September 2003.

RMCD's Response to COVID-19 and Extended MCO

Royal Malaysian Customs Department ["RMCD"] has on 29th May 2020 published the [Notification of Operations and Services of the RMCD within the Extended Period of Implementation of the Movement Control Order \("MCO"\)](#) ["the Notification"].

The salient points pertaining to the Notification are as summarised below:-

- i. The RMCD has informed that penalties in respect of the following taxes and levy which are due for payment during the MCO period will be fully remitted if the payment is made by 30th June 2020:-
 - Sales Tax / Service Tax submitted via Form SST-02;
 - Imported Service Tax submitted via Form SST-02A;
 - Tourism Tax submitted via Form TTx-03; and
 - Departure Levy submitted via Form DL-02.
- ii. The above concession is only applicable to payments / returns for the taxable periods ended 29th February 2020, 31st March 2020 and 30th April 2020.
- iii. In addition, the RMCD will not initiate any legal action against taxpayers in respect of offences committed as a result of the late submission of returns.
- iv. Payments of sales tax or service tax via online or postal service are encouraged.

Note: For further information, kindly refer to our email dated 1st May 2020 on the [Latest Update on FAQ on Tax Matters during the MCO Period – In Response to the Extension of MCO Period until 12th May 2020](#).

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