



MOORE Advent

TAX FLASH

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In this Issue

- **PN No.2/2021 – Explanation Relating to Expenditure or Additional Expenses for the Purpose of Deduction Allowed in the Income Tax (Deduction for Expenditure on Issuance of *Sukuk* and Retail *Sukuk* Structured Pursuant to the Principle of *Wakalah*) Rules 2021 [P.U.(A) 5/2021]**
- **Employer Audit Framework**
- **Special Deduction for Reduction of Rental of Business Premises Offered to SME and Non-SME Tenants**
- **Stamp Duty Exemption on Instrument of Loan or Financing Agreement Between an SME and a Financial Institution Relating to Targeted Relief and Recovery Facility**
- **Stamp Duty Exemption on Instrument of Loan or Financing Agreement Relating to Restructuring or Rescheduling of a Loan Between a Borrower or Customer and a Financial Institution**
- **Transfer Pricing Flowchart and Self-Test**
- **Postponement of the Date for the Implementation of Tourism Tax on Accommodation Premises Booked Through Digital Platform Service Provider**
- **Guide on Professional Services**

- Moore Malaysia
- Moore Global
- Inland Revenue Board

PN No. 2/2021 – Explanation Relating to Expenditure or Additional Expenses for the Purpose of Deduction Allowed in the Income Tax (Deduction for Expenditure on Issuance of *Sukuk* and Retail *Sukuk* Structured Pursuant to the Principle of *Wakalah*) Rules 2021 [P.U.(A) 5/2021]

The Inland Revenue Board [“IRB”] has recently issued the *Practice Note [“PN”] No.2/2021 – Explanation Relating to Expenditure or Additional Expenses for the Purpose of Deduction Allowed in the Income Tax (Deduction for Expenditure on Issuance of *Sukuk* and Retail *Sukuk* Structured Pursuant to the Principle of *Wakalah*) Rules 2021 [P.U.(A) 5/2021]* to provide clarification on expenses or additional expenses which are allowable as deduction under the Income Tax (Deduction for Expenditure on Issuance of *Sukuk* and Retail *Sukuk* Structured Pursuant to the Principle of *Wakalah*) Rules 2021.

The PN also provides examples to illustrate treatment relating to deduction for expenditure and additional expenses on issuance of *sukuk* and retail *sukuk* as below:-

	Approved <i>Sukuk</i> Not Issued or Offered to Retail Investor	Approved <i>Sukuk</i> Issued and Offered to Retail Investors
Scenario	<ul style="list-style-type: none"> Company A issued a <i>Sukuk</i> where the expenditure incurred for the issuance of the <i>Sukuk</i> is RM250,000 for the Year of Assessment [“YA”] 2021 	<ul style="list-style-type: none"> Company B issued a <i>Sukuk</i> where the expenditure incurred for the issuance of the <i>Sukuk</i> is RM300,000 for the YA 2021 This amount includes an additional expense of RM50,000 incurred for cost of printing and advertising the prospectus.
Tax Deduction	<ul style="list-style-type: none"> Company A is eligible to claim RM250,000 as a deduction for expenditure. 	<ul style="list-style-type: none"> Company B is eligible to claim RM250,000 as a deduction for expenditure Additional expenses of RM50,000 for the issuance of retail <i>sukuk</i> is eligible for double deduction (i.e. RM50,000 X 2) Hence, total deduction is RM350,000.

Note : For further details relating to the Income Tax (Deduction for Expenditure on Issuance of *Sukuk* and Retail *Sukuk* Structured Pursuant to the Principle of *Wakalah*) Rules 2021, kindly refer to our *Tax Flash – February 2021 issue*.

Employer Audit Framework

The IRB has recently issued the *Employer Audit Framework (in Bahasa Malaysia)* dated 1st October 2021 with an aim to ensure that audit on the employer is conducted in a fair, transparent and equitable manner. The framework outlines the rights and responsibilities of the audit officer, employers and tax agents in an audit on employer under the provisions of the Income Tax Act 1967 [“ITA 1967”].

The salient points in the above framework are as follows:-

i. Covered Period

- The employer audit activities normally cover up to 2 current years of remuneration.
- However, it may be extended without limitation in the following cases:-
 - failure to remit monthly tax deduction ["MTD"];
 - Inadequate remittance of MTD;
 - repeated failure to comply with tax laws; and
 - complaint case.

ii. Initial Action of Employer Audit

- Letter requesting for documents and information will be sent to employer via email, facsimile or post.
- Employer is required to respond within 14 days from the date of the letter requesting for documents and information. If the employer fails to respond within the prescribed time, audit action will proceed using appropriate method.
- The employer selected for audit will be notified at least 14 days before audit visit.
- The IRB may visit any of the employer's premises or related premises by notifying the employer in advance.

iii. Settlement of Employer Audit

- An employer is allowed 18 days from the date of notification of audit findings to file an objection (together with supporting documents). If no objection is made within the stipulated period, the employer is deemed to have agreed with the audit findings.
- Employer audit has to be completed within 90 calendar days from the date of receipt of the documents and information from the employer or the date of audit visit. Employer will be informed by the IRB if the audit cannot be completed within the stipulated period.
- Completed employer audit cases will not be re-audited for the same year of remuneration and issue except for the complaint case and inadequate remittance of MTD.

iv. Voluntary Disclosure

- Voluntary disclosure means employer makes voluntary disclosure in writing or media electronic any time before commencement of employer audit.
- Employer audit is deemed to have commenced from the date of the letter requesting for documents and information is issued to the employer via email, facsimile or post.

v. Offences and Penalty

- An employer who without reasonable excuse, fails to comply with any of the following, shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than RM200 and not more than RM20,000 or to imprisonment for a term not exceeding six (6) months or to both i.e.:-
 - fails to furnish Return Form of Employer ["Form E"] or to prepare and render Statement of Remuneration from Employment ["Form EA"];
 - fails to furnish Notification of New Employee ["Form CP22"], Tax Clearance Form for Cessation of Employment of Private Sector Employees ["Form CP22A"] / Tax Clearance Form for Cessation of Employment of Public Sector Employees ["Form CP22B"] and Notification by Employer of Departure from the Country of an Employee ["Form CP21"]; and
 - fails to comply with a direction given under Section 83(5) of the ITA 1967, money payable to departing or terminating employees or Section 107 of the ITA 1967, deduction of tax from emoluments and pensions.

The above Employer Audit Framework takes effect from 1st October 2021.

Special Deduction for Reduction of Rental of Business Premises Offered to SME and Non-SME Tenants

Following the recent economic stimulus packages announced by the Government, the following has been gazetted to provide special deduction of reduction of rental of business premises to landlords who offer at least 30% of the rate of monthly rental to small and medium enterprise ["SME"] and non-SME tenants:-

- *Income Tax (Special Deduction for Reduction of Rental to a SME) Rules 2021*; and
- *Income Tax (Special Deduction for Reduction of Rental to a Tenant Other Than a SME) Rules 2021*.

The special deduction allowed against the rental income derived from the SME and non-SME tenants shall be an amount equivalent to the total amount of reduction of rental of not less than 30% of the rate of monthly rental under the existing tenancy agreement. Landlords who offer the minimum 30% reduction of rental of business premises during the following period will be eligible for the special deduction:-

<u>Business Premises Rented to</u>	<u>Qualifying Months</u>
SME tenant	April 2020 to December 2021
Non-SME tenant	January 2021 to December 2021

To substantiate the claim for the special deduction by the owners of the business premises, the following must be available:-

- i. A tenancy agreement which is stamped under the Stamp Act 1949;
- ii. A separate statement of income for rental income for the qualifying months in the basis period for a year of assessment;
- iii. A confirmation made by the:-
 - Landlord stating the amount of reduction of rental given; and
 - Tenant stating the receipt of reduction of rental; and
- iv. A certificate issued by the SME Corporation Malaysia confirming the status of the SME (where applicable).

The Income Tax (Special Deduction for Reduction of Rental to a SME) Rules 2021 and Income Tax (Special Deduction for Reduction of Rental to a Tenant Other Than a SME) Rules 2021 are deemed to have effect from the YA 2020 and YA 2021 respectively.

Stamp Duty Exemption on Instrument of Loan or Financing Agreement Between an SME and a Financial Institution Relating to Targeted Relief and Recovery Facility

Following the establishment of the Targeted Relief and Recovery Facility by Bank Negara Malaysia, the *Stamp Duty (Exemption) (No. 10) Order 2021* has been gazetted to provide an exemption from stamp duty, on application, for an instrument of loan or a financing agreement entered into by a SME with a financial institution.

The above stamp duty exemption shall only apply if:-

- i. the letter of offer in relation to the loan or financing facility is issued by the financial institution from 1st January 2021 until 31st December 2021; and
- ii. the application for the stamp duty exemption is accompanied by the letter of offer issued by the financial institution to the SME which states the approval of the loan or financing facility.

For the purpose of the above Order:-

“Financial institution” has the same meaning as that assigned to “banker” in Section 2 of the Stamp Act 1949, and any person prescribed as a financial institution by the Minister under Subsection 2(1) of the Central Bank of Malaysia Act 2009 [“CBMA”] for the purposes of Section 49 of CBMA.

“Loan or financing facility” means a loan or financing facility approved under Bank Negara Malaysia’s Fund for SME:-

- i. All Economic Sectors Facility;
- ii. SME Automation and Digitalisation Facility; or
- iii. Agrofood Facility.

“Small and medium enterprises” means enterprises as may be 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 Order is deemed to have come into operation on 1st January 2021.

Stamp Duty Exemption on Instrument of Loan or Financing Agreement Relating to Restructuring or Rescheduling of a Loan Between a Borrower or Customer and a Financial Institution

The *Stamp Duty (Exemption) (No. 11) Order 2021* has been gazetted to provide an exemption from stamp duty, on application, on instrument of loan or a financing agreement for restructuring and rescheduling of a loan or financing between a borrower or customer and a financial institution, executed on or after 1st July 2021 up to 31st December 2021.

The above stamp duty exemption shall only apply if:-

- i. the existing instrument of loan or financing agreement has been duly stamped under item 22 or 27 of the First Schedule of the Stamp Act 1949; and
- ii. the restructuring or rescheduling of a loan or financing does not contain the element of additional value to the original amount of loan or financing under the existing instrument of loan or financing agreement.

The interest or profit accrued from the restructured or rescheduled payment is not considered as an element of additional value to the original amount of loan or financing under the existing instrument of loan or financing agreement. The application shall be accompanied by the relevant document relating to the restructuring or rescheduling of that loan or financing.

For the purpose of the above Order:-

“Financial institution” has the same meaning as that assigned to “banker” in Section 2 of the Stamp Act 1949.

“Restructuring or rescheduling” means any modification made to the existing repayment terms and conditions of the loan or financing agreement pursuant to a concession provided by the financial institution due to the inability of the borrower or customer to comply with the existing repayment schedule consequent to deteriorating financial conditions.

The above Order is deemed to have come into operation on 1st July 2021.

Transfer Pricing Flowchart and Self-Test

The IRB has recently issued the following to assist taxpayers identify and to determine if they are required to prepared transfer pricing documentation under the Malaysian transfer pricing legislations and guidelines:-

- [Transfer Pricing Documentation Flowchart](#); and
- [Transfer Pricing Documentation Self-Test](#).

The flowchart shows in sequence the steps to be taken in determining if preparation of a transfer pricing documentation is required. The self-test helps the taxpayer to determine if preparation of a transfer pricing documentation is required through a series of questions and answers.

Postponement of the Date for the Implementation of Tourism Tax on Accommodation Premises Booked Through Digital Platform Service Provider [“DPSP”]

Royal Malaysian Customs Department [“RMCD”] had via an announcement dated 30th September 2021 informed the [deferral of the implementation of tourism tax on accommodation premises booked through DPSP](#), wherefore the effective date of 1st January 2022 (which was postponed from the initial effective date of 1st July 2021) is now postponed to 1st January 2023. The effective date for DPSP registration has also been postponed from 1st October 2021 to 1st October 2022.

Note : For further details, kindly refer to our [Tax Flash – April 2021](#) issue.

Guide on Professional Services

RMCD has published the updated [Guide on Professional Services](#) [“the Updated Guide”] dated 21st September 2021 (to replace the guide dated 6th October 2020 issued previously – the Old Guide). The Updated Guide provides clarification on the RMCD’s latest stance in respect of the professional services listed in Group G, First Schedule of the Service Tax Regulations 2018. The salient points extracted from the Updated Guide are as follows:-

- RMCD has updated the following diagram pertaining to the taxability of the director’s remuneration which includes fee, allowances, benefits-in-kind [“BIK”] etc. We have extracted below the diagram issued by RMCD in the Old Guide and the same diagram shown in the Updated Guide:-

Guide As At 21st September 2021

Diagram 1:

Service Tax Treatment on Office Holders/ Directors’ Fees

No.	Type of payment	Subject to Service Tax	Not Subject to Service Tax
1.	Directors’ remuneration / fee	√	
2.	Directors’ allowances e.g: Meeting allowance, monthly allowance, Senior Independent Director (SID) allowances and other allowances, etc.	√	
3.	Benefit-in-kind (BIK)*	√	√
4.	Reimbursement	√	
5.	Disbursement*		√

Diagram 1:

Service Tax Treatment On Office Holders/ Directors' Fees

No.	Type of payment	Subject to Service Tax	Not Subject to Service Tax
1.	Directors' remuneration/ fee	√	
2.	Directors' allowances e.g: Meeting allowance, monthly allowance		√
3.	Benefit in kind (BIK)		√
4.	Reimbursement or disbursement		√

Based on the above updated diagram, where a person is appointed as a non-executive director ["NED"] in his personal capacity under **contract for service** to provide expert opinion, any fees charged by the NED (save and except for the following charges) for the provision of such services are subject to service tax.

The following situations or transactions are not subject to service tax:-

- i. BIK
 - The BIK forms part of the remuneration package and it is a perquisite that acts as added incentive for directors. The NED may receive the benefits such as allowance in the form of cash given directly by the appointing company which is subject to service tax. However, the facility fee which is paid directly by the appointing company to the service providers for the use or enjoyment of the NED is not subject to service tax.
- ii. Disbursement
 - Any charges that satisfied the definition of "disbursement" are not subject to service tax. Please refer to the service tax treatment as mentioned in the Guide on Disbursement and Reimbursement which is found in the RMCD portal (<https://mysst.customs.gov.my/>).

Note : For further details, kindly refer to our *Tax Flash – October 2020* issue.

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