

# ▶▶ Tax Flash



April 2013

## PR No. 2/2013 – Perquisites from Employment

The Inland Revenue Board [“IRB”] has recently issued the Public Ruling [“PR”] No. 2/2013 – Perquisites from Employment. This PR provides clarification on the distinction between perquisites and benefits in kind, meaning and types of perquisites and the relevant tax treatment, the employer’s and employee’s responsibilities in relation to the granting and receipt of perquisites respectively.

The above PR was issued to merge the original PR No. 1/2006 dated 17<sup>th</sup> January 2006 with:-

- Addendum to PR No.1/2006 dated 30<sup>th</sup> August 2007;
- Second Addendum to PR No. 1/2006 dated 25<sup>th</sup> February 2009; and
- Third Addendum to PR No.1/2006 dated 30<sup>th</sup> July 2009.

## PR No. 3/2013 – Benefits In Kind

The IRB has recently issued the PR No. 3/2013 – Benefits In Kind [“BIK”]. This PR provides clarification on the tax treatment in relation to BIK received by an employee from his employer for exercising an employment and the method of ascertaining the value of BIK.

The above PR was issued to merge the original PR No. 2/2004 dated 8<sup>th</sup> November 2004 with:-

- Addendum to PR No.2/2004 dated 20<sup>th</sup> May 2005;
- Second Addendum to Public Ruling No. 2/2004 dated 17<sup>th</sup> January 2006;
- Third Addendum to PR No.2/2004 dated 17<sup>th</sup> April 2009; and
- Fourth Addendum to PR No.2/2004 dated 19<sup>th</sup> April 2010.

### Hyperlinks

Advent Consulting Group  
Inland Revenue Board

### References

PR No. 2/2013

PR No. 3/2013

### Guidelines on Taxation of Electronic Commerce

The IRB has recently issued the Guidelines on Taxation of Electronic Commerce which provide guidance on the basic tax issues and income tax treatment in respect of electronic commerce ["e-commerce"] transactions. The IRB adopts the principle of neutrality where both e-commerce and conventional business are subject to the same tax treatment.

Salient points of the abovementioned Guidelines include:-

- i. Scope of Tax for Business
  - For business income, the income of a person attributable to the business operations carried on in Malaysia is deemed to be derived from Malaysia and is subject to tax in Malaysia.
  - In determining the carrying on of business operations within Malaysia, factors to be considered include performance of contractual obligations and location where contracts are formed, services are performed or where goods are stored and arrangement was made for delivery of the products.
  - For e-commerce, some business activities that may be considered in determining of business operations includes sourcing of content, procurement of goods, promotions, advertisement, selling, updating and maintaining the website, uploading and downloading of contents.
- ii. Treatment of Server and Website in Determining Derivation of e-Commerce Income
  - A website is hosted on a server which is located at a certain place.
  - Though the server and website facilitates the performance of business activities, a server/website itself does not carry any meaning in determining derivation of income.
  - Business income from e-commerce would be considered as Malaysian income if the operations test shows that the person is carrying on a business in Malaysia regardless of the location of the server.

Example

- A company in Malaysia is engaged in the provision of consultancy services.
- It has a website hosted on a server located outside Malaysia which supplies details of its services, answer enquiries, enable communications with its clients/potential clients and accept payments for services rendered.
- The company obtains consultancy projects from overseas clients through the website.
- The business activities relating to the consultancy services including collecting and analysing data, undertaking research, preparing reports, etc. is done in Malaysia.
- Income from the consultancy services is deemed to be derived from Malaysia due to the substantial business operations in Malaysia regardless of the location of the server.

- iii. Business Models of e-Commerce
  - The Guidelines set out several business models to provide guidance as to whether income from e-commerce is derived from Malaysia and subject to Malaysian tax.
  - A summary of positions taken by the IRB under various scenarios is provided in the attachment to the Guidelines.
  
- iv. WT on Royalty
  - The term 'royalty' as defined under the Income Tax Act 1967 ["the Act"] includes payments for the use of or the right to use:-
    - copyrights of intangible products;
    - know-how (intangible products); or
    - information concerning technical, industrial, commercial or scientific knowledge, experience or skill.
  - Such payments to a non-tax resident which are deemed derived from Malaysia would be subject to withholding tax ["WT"].
  
- v. Issues of Double Taxation and Tax Treaties
  - Where income from e-commerce derived by a resident person is subject to tax both in Malaysia and the foreign country e.g. a resident person having business operations in Malaysia and sets up a website on a server outside Malaysia, provision for double tax relief (i.e. unilateral or bilateral relief) is available in the Act and the relevant Double Taxation Agreement ["DTA"] entered into by the government of Malaysia and the foreign country.
  - Under tax treaties, the allocation of taxing right over business income between countries that are partner to a tax treaty is based on the Permanent Establishment ["PE"] concept. For example, if the server of a non-tax resident person located in Malaysia constitutes a PE under the applicable DTA, the income arising from e-commerce through the server will be considered as Malaysian source income and liable to tax in Malaysia.
  - According to the Organisation for Economic Co-operation and Development ["OECD"] commentary, a server at a disposal of a business can only constitute a PE of the business if the activities conducted through the server are not regarded as preparatory or auxiliary which includes:-
    - providing a communication link-much like a telephone line – between supplier and customers
    - advertising of goods or services
    - gathering market data
    - supplying information
  - A server could constitute a PE if the functions performed at the server represent a significant and essential part of the enterprise's business activities such as conclusion of contract with the customer, processing of payment and delivering of products.

## **Guidelines on Application for Status and Incentive for Setting Up a TMC**

The Malaysian Investment Development Authority ["MIDA"] has recently issued the Guidelines on Application for Status and Incentive for Setting Up a Treasury Management Centre ["TMC"]. An approved TMC is a locally incorporated company that provides centralised management services for its group of related companies within and outside Malaysia.

Salient points of the above Guidelines include:-

- i. Eligibility Criteria
  - The company must fulfill the following criteria:-
    - incorporated under the Companies Act 1965;
    - minimum paid-up capital of RM0.5 million;
    - minimum total operating expenditure (excluding interest expenditure related to funding activities of the TMC and depreciation) of RM1.5 million incurred domestically per year of assessment;
    - at least 3 senior professionals appointed to work under the TMC; and
    - providing qualifying treasury services to at least 3 related companies outside Malaysia.
- ii. Treasury Services / Qualifying Services
  - Cash, Financing and Debt Management
    - cash pooling arrangement through a centralised account with a licensed onshore bank;
    - providing financing sourced from surplus funds within the group or financial institution in Malaysia to a related company in or outside Malaysia;
    - arranging for competitive financing sourced from surplus funds within the group, financial institutions in Malaysia or the issuance of bonds/sukuk;
    - providing or arranging for financial and non-financial guarantee for its group of companies;
    - current account management for managing account payables and receivables and maintaining inter-company offsetting arrangement.
  - Investment services
    - investing funds within the group in domestic money market and in foreign currency assets onshore and offshore.
  - Financial risk management
    - hedging of exchange rate risk, interest rate / benchmark rate risk, market risk, credit/counterparty risk, liquidity risk and commodity price risk.

Guidelines on Application for Status and Incentive for Setting Up a TMC

iii. Incentives

- 70% exemption of the statutory income arising from the provision of qualifying services to its related companies located outside Malaysia for 5 years.
- Income from qualifying services provided by a TMC to its related companies in Malaysia during its tax exempt period is exempted from tax provided such income does not exceed 20% of the TMC income from qualifying services.
- Exemption from WT on interest payments / profits on borrowings by the TMC from financial institutions and related companies.
- Exemption from stamp duty on all loan/financing agreements and service agreements executed by treasury centres in Malaysia.
- Expatriates working in a TMC are exempted from tax on the portion of their chargeable income attributable to the employment exercised outside Malaysia.
- Foreign Exchange Administration flexibilities; and
- No local equity condition.

iv. Procedure for Application

- Application for an approved TMC status should be submitted to MIDA together with the relevant supporting documents/information.

**Note :** For further information on the above tax incentives, kindly refer to our Tax Flash – July 2012 and October 2012 issues.

**Guidelines on the Establishment of Labuan International Commodity Trading Company under the Global Incentives for Trading Programme**

The Labuan Financial Services Authority has on 1<sup>st</sup> April 2013 issued the Guidelines on the Establishment of Labuan International Commodity Trading Company ["LITC"] under the Global Incentives for Trading ["GIFT"] Programme to set out the parameters relating to the establishment and operation of the LITC under the GIFT programme. The GIFT programme is a framework of incentives for traders of specified commodities, to use Malaysia as their international trading base to undertake International Commodity Trading Business in Labuan IBFC.

Salient points of the abovementioned Guidelines include:-

i. GIFT Programme

- The Labuan international commodity trading business is the trading of physical and related derivative instrument of:-
  - petroleum and petroleum-related products including liquefied natural gas ["LNG"];
  - agriculture products;
  - refined raw materials;
  - chemicals; and
  - base materials.
- To deal only with non-residents in any currency other than Ringgit.
- LITC is allowed to establish its operational offices anywhere in Malaysia.

Tax Flash – July 2012

Tax Flash – October 2012

Guidelines on the Establishment of LITC under the GIFT

ii. Qualifying Criteria

- LITC must comply with the following criteria:-
  - Minimum annual turnover of USD 100 million;
  - Minimum annual business spending of RM3 million payable to Malaysian residents; and
  - Employ at least 3 professional traders with a minimum salary of RM15,000 per month each and being resident of Malaysia in a calendar year for the year of assessment.
- However, the LITC is exempted from complying with the above for the first 5 years from the date of licence.

iii. Preferential Tax Treatment

- The LITC is subject to tax at the rate of 3% of chargeable profits as reflected in the audited accounts under the Labuan Business Activity Tax Act 1990.
- A LITC set up purely as an LNG trading company would be entitled to 100% tax exemption on income for the first 3 years of its operation provided the company is licensed before 31<sup>st</sup> December 2014. Thereafter, the LITC will be subject to tax at the rate of 3% of chargeable profits as mentioned above.

iv. Other Incentives

- 100% exemption on director fees paid to non-Malaysian director.
- 50% exemption on gross employment income of non-Malaysian professional, managerial staff including traders with the LITC.
- Exemption on dividends received by or from the LITC.
- Exemption on royalties received from the LITC.
- Exemption on interest received by resident or non-resident from the LITC.
- Stamp duty exemption on all instruments for Labuan business activities, Memorandum and Articles of Association of Labuan company and transfer of shares.

The application for undertaking the Labuan international commodity trading business under the GIFT programme can be submitted to the Labuan Financial Services Authority.

### Tax Incentives for Reviving Abandoned Projects

Following the 2013 Budget announcement, the Ministerial Orders and Rules relating to the following incentives available to those involved in relation to an abandoned housing projects have recently been gazetted:-

i. ***Tax Exemption of Interest Income Derived from Loan Granted to a Rescuing Contractor/Developer***

- Pursuant to the Income Tax (Exemption) (No. 9) Order 2013, a bank or financial institution is exempted from payment of income tax in respect of 100% of statutory income derived from interest relating to the business of giving loan to rescuing contractors/developers for a period of 3 consecutive years of assessment ["exempt years of assessment"] commencing from the first year of assessment in which the interest income is derived.

Income Tax (Exemption)  
(No. 9) Order 2013

- Any unabsorbed adjusted loss from the business of giving loan to the rescuing contractor/developer not utilised to reduce the statutory income during the exempt years of assessment shall be carried forward and deducted against the total income in the post-exempt years of assessment until it is fully utilised.
- Application for the loan must be made by the rescuing contractors/developers from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2015.
- The above Order shall have effect from the YA 2013.

ii. ***Deduction for Expenses in Relation to Interest and Incidental Cost in Acquiring Loan for Abandoned Projects***

- Pursuant to the Income Tax (Deduction for Expenses in Relation to Interest and Incidental Cost in Acquiring Loan for Abandoned Projects) Rules 2013, a rescuing contractor/developer is allowed the following deductions:-
  - Double deduction of the expenses incurred in acquiring loan to finance the abandoned project; and
  - Further deduction [in addition to tax deduction allowed under Section 33(1) of the Act] of the interest expense incurred on the loan acquired to finance the abandoned project.for a period of 3 consecutive years of assessment from the year of assessment in which the loan is approved.
- Approval for the loan must be obtained from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2015.
- The above double/further deduction of expenses in relation to interest and incidental cost in acquiring loan for abandoned project shall only be claimed in the basis period for a year of assessment in which the abandoned project is completed.
- The development expenditure and portion of general and administrative expenses attributable to the abandoned project shall be accumulated and claimed in the basis period for a year of assessment the abandoned project is completed.
- Likewise, the capital allowances on assets used for the abandoned project shall be accumulated and claimed in the basis period for a year of assessment the abandoned project is completed and any unabsorbed capital allowances shall be disregarded.
- When the abandoned project is completed, a final account has to be prepared to ascertain the actual profit or loss derived therefrom.
- The above Rules shall have effect from the YA 2013.

Income Tax (Deduction for Expenses in Relation to Interest and Incidental Cost in Acquiring Loan for Abandoned Projects) Rules 2013

**iii. Stamp Duty Exemption for Purchasers of a Revived Residential Property**

- Pursuant to the Stamp Duty (Exemption) (No. 5) Order 2013, exemption from stamp duty is granted to purchasers of a revived residential property on the following:-
  - any instrument of transfer for the purpose of transferring the revived residential property in relation to the abandoned project; and
  - any loan agreement approved by a bank or financial institution to finance the revived residential property in relation to the abandoned project.
- The above exemption applies to instruments executed from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2015.

Stamp Duty (Exemption)  
(No. 5) Order 2013

**iv. Stamp Duty Exemption for a Rescuing Contractor/Developer**

- Pursuant to the Stamp Duty (Exemption) (No. 6) Order 2013, exemption from stamp duty is granted to a rescuing contractor/developer of an abandoned housing project on the following:-
  - any instrument of transfer for the purpose of transferring the revived residential property in relation to the abandoned project; and
  - any loan agreement approved by a bank or financial institution to finance the abandoned project.
- The above exemption applies to instruments executed from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2015.

Stamp Duty (Exemption)  
(No. 6) Order 2013

For the purposes of the above Orders/Rules:-

"Bank or financial institution" means a person resident in Malaysia who is:-

- a. a bank or finance company licensed or deemed to be licensed under the Banking and Financial Institutions Act 1989;
- b. a bank licensed under the Islamic Banking Act 1983;
- c. a development financial institution prescribed under the Development Financial Institutions Act 2002;
- d. an insurance business licensed under Insurance Act 1996; or
- e. a takaful operator licensed under the Takaful Act 1984;

"rescuing contractor or developer" means a contractor or developer who is appointed or approved by the Minister of Housing and Local Government to carry on rehabilitation works for the abandoned project;

"abandoned project" means a project which is certified by the Minister of Housing and Local Government as abandoned project pursuant to Paragraph 11(1)(ca) of the Housing Development (Control and Licensing) Act 1966.



### **Petroleum (Income Tax) (Investment Allowance) Regulations 2013**

Pursuant to the Petroleum (Income Tax) (Investment Allowance) Regulations 2013, a chargeable person who has incurred qualifying capital expenditure in respect of a qualifying project or on infrastructure asset for the purpose of carrying on petroleum operations shall be eligible to claim investment allowance at the rate of 60% of that expenditure incurred in the basis period for a year of assessment within a period of 10 years. The investment allowance given to that person for a year of assessment shall be utilised to reduce the statutory income, restricted to 70% of the statutory income of that qualifying project for that year of assessment. In the absence or insufficiency of statutory income for the basis period for a year of assessment, any unutilised investment allowance for that year of assessment in respect of that qualifying project shall be deemed to be an allowance to be given for the first subsequent year of assessment for the basis period for which there is statutory income from that qualifying project and thereafter until it is fully utilised.

A qualifying project is a project undertaken by a chargeable person:-

- in a field which carries out one or more projects in respect of enhanced oil recovery, high carbon dioxide gas, high pressure high temperature or any combination thereof; or
- in an area under a petroleum agreement, in respect of a deepwater project.

The above Regulations are deemed to have come into operation on 30<sup>th</sup> November 2010.

### **Accelerated Capital Allowances for Petroleum Operations in a Marginal Field**

Pursuant to the Petroleum (Income Tax) (Accelerated Capital Allowances) (Marginal Field) Rules 2013, accelerated capital allowances shall be granted to a chargeable person who has incurred qualifying plant expenditure for the purpose of carrying out petroleum operations in a marginal field. The rates of initial allowance and annual allowance shall be 25% and 15% respectively and apply to the qualifying capital expenditure incurred in the basis period for the YA 2010 until YA 2024.

“Marginal field” means a field within a petroleum agreement area which has potential crude oil reserves not exceeding 30 million stock tank barrels or natural gas reserves not exceeding 500 billion standard cubic feet.

The above Rules are deemed to have come into operation on 30<sup>th</sup> November 2010.

Petroleum (Income Tax)  
(Investment Allowance)  
Regulations 2013

Petroleum (Income Tax)  
(Accelerated Capital  
Allowances) (Marginal Field)  
Rules 2013

### Tax Exemption for LITC

Following the 2013 Budget announcement, the following exemption orders relating to the LITC have been gazetted:-

i. **Labuan Business Activity Tax (Exemption) Order 2013**

- Pursuant to the above Order, the LITC is exempted from tax in respect of income derived from qualifying activity, i.e. trading of physical and related derivative instruments of LNG in any currency other than Ringgit.
- The exemption is given for a period of 3 consecutive years commencing from the first year of its operation.

ii. **Labuan Business Activity Tax (Exemption) (No.2) Order 2013**

- Pursuant to the above Order, the LITC is exempted from the provision of Section 7(1) of the Labuan Business Activity Tax Act 1990, i.e. no election to be made by the LITC to be charged to tax at RM20,000 for a year of assessment. As such, tax shall be charged at 3% of the chargeable profits per the audited accounts for the basis period for a year of assessment.
- This Order shall not apply to the LITC which involves solely in the trading of physical and related derivative instruments for LNG for the first 3 years of its operation.

The above Orders shall have effect from the YA 2013.

Labuan Business Activity  
Tax (Exemption) Order  
2013

Labuan Business Activity  
Tax (Exemption) (No. 2)  
Order 2013

This publication is provided gratuitously and without liability. It is intended as a general guide only and the application of its contents to specific situations will depend on the particular circumstances involved. Readers should seek appropriate professional advice regarding any particular problems that they encounter, and this tax update should not be relied on as a substitute for this advice. Accordingly, Advent Tax Consultants Sdn Bhd assumes no responsibility for any errors or omissions it may contain, whether caused by negligence or otherwise, or for any losses, however caused, sustained by any person that relies on it. Should further information, clarification or advice be required on any of the contents stated herein, please feel free to contact our tax team.