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NEWSFLASH MALAYSIA

GROWING STRATEGICALLY

Issue:
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→ Tax Incentive for IP Development

The Malaysian Investment Development Authority ("MIDA") recently published Guidelines on the Incentive in relation to Intellectual Property Development, which is available on its website.

The Guidelines are in line with the Budget 2020 announcement to promote Malaysia as a research & development ("R&D") centre. Under the Guidelines, there will be a full income tax exemption of up to 10 years applicable on qualifying intellectual property ("IP") income derived from patent and copyrighted software.

The Guidelines also clarify that the IP income that will be tax exempt should be proportionate to the R&D activities undertaken in Malaysia. The ratio of IP income would be determined based on the Modified Nexus Approach ("MNA") under the OECD'S Base Erosion and Profit Shifting ("BEPS") Action Plan No. 5. Details of the MNA formula applicable to the Malaysia IP development incentive is pending from the authorities.

The tax exemption on qualifying IP income is welcomed, as IP income has previously been removed from the scope of Malaysia's tax incentives due to Malaysia's commitment under the Inclusive Framework on BEPS. Consequently, the IP income excluded from Malaysian tax incentives was fully taxable from 1 July 2018 (in respect to income from new IP); and 1 July 2021 (income from existing IP).

A qualifying person would cover new/existing companies that own the rights in the IP and receive income from the qualifying IP activities related to the promoted activities prescribed under the Promotion of Investments Act 1986 and Income Tax Act 1967 ("ITA").

The qualifying conditions are

The company

1. is incorporated and resident in Malaysia;
2. conducts R&D activities in Malaysia leading to the development, improvement, modification or creation of the qualifying IP assets;
3. The IP is registered/filed with the Intellectual Property Corporation of Malaysia ("MyIPO") or any equivalent body outside Malaysia;
4. has at least 30 percent of staff active in science and technical fields with at least a diploma or higher qualification, and a minimum five years of experience from related fields; and
5. has an adequate amount of annual business operating expenditure incurred in Malaysia.

Qualifying IP income include royalty income and license fees.

Qualifying expenditure ("QE") should form part of the calculation of the MNA ratio and be in accordance with the expenditure under section 34A of the ITA. QE covers cost sharing arrangements (the cost of the payable should be clearly evidenced in the relevant agreement). QE may also be backdated up to three years from the date of filing or registration of the IP.

The scope of this tax incentive appears to be narrower as it excludes royalty or other income derived from IP rights, and instead only covers royalty and license fees.

Taxpayers who are impacted especially by the previous exclusion of the IP income from Malaysian tax incentives should consider the tax exemption under the IP development incentive to manage the Malaysia tax exposure on their IP income. In doing so, taxpayers should consider whether a restructuring of the IP income is necessary, as only income of a royalty or license fee nature would qualify, to avail for the tax exemption under the IP development tax incentive.

→ Country-by-Country Reporting ("CbCR")

On 25 May 2021, the Malaysian Inland Revenue Board ("MIRB") announced via its website that commencing the Year of Assessment ("YA") 2021, constituent entities now need to furnish the CbCR Notification via the Corporate Tax Return Form ("Form C"). For constituent entities filing other tax return forms (e.g. Form TF, TP, and LE) will continue to file the CbCR Notification using the format (Annex B/C1/C2) released by the MIRB.

Up to YA 2020, the Malaysian constituent entities of a multinational enterprise group ("MNE Group") were required to file the CbCR Notification letters to the MIRB for each reporting financial year by the last date of such reporting financial year. For example, if the reporting financial year end for CbCR is 30 June 2020, then the CbCR Notification will be due by 30 June 2020.

Starting from YA 2021, taxpayers filing tax return via Form C would need to complete the CbCR Notification template provided within the Form C. For example, if the reporting year-end is up to 31 March 2021, i.e. YA 2021, then the CbCR Notification would already need to be submitted by 31 March 2021. If the Form C is filed by 31 October 2021, i.e. the statutory deadline, the relevant constituent entities would still need to complete the CbCR Notification within the Form C for YA 2021.

However if the reporting year end is 30 June 2021 (YA 2021), then the CbCR Notification would be submitted with the Form C by 31 January 2022, i.e. the statutory deadline. In this case, there is no need to file a separate CbCR Notification Letter by 30 June 2021.

If the constituent entity is a Labuan entity under the Labuan Business Activity Tax Act ("LBATA"), and does not file the Form C, then the following applies:

1. Existing due date to file the CbCR Notification remains the same, i.e. on or before the last day of the reporting financial year;

2. Labuan constituent entity to continue filing CbCR Notification Letter, i.e. Annex B (for Labuan ultimate parent entity), Annex C1 (for Labuan constituent entity of Malaysian ultimate / surrogate parent), and Annex C2 (for Labuan constituent entity of foreign ultimate/surrogate parent);

3. Previously, the Malaysian MNE Group would submit two CbCR Notification Letters under CbCR Rule 6(1) by reporting entity and under CbCR Rule 6(2) by non-reporting entity, i.e. consolidated CbCR Notification by one constituent entity on behalf of others – following Annex C1. Now, if there are more than one constituent entities in Labuan subject to LBATA, then the option to file a single consolidated Notification Letter under CbCR Rule 6(2) through Annex C1 by any one of the Labuan constituent entities continue to remain available; and

4. If it is a foreign MNE Group, then all the Labuan constituent entities should continue to file separate CbCR Notification Letters from Annex C2.

→ Extension of Time for Submission of Tax Returns

The Malaysian Inland Revenue Board ("MIRB") has updated the FAQ and provided an additional one month extension of time, i.e. 2 months grace period, for submission of tax returns for Companies, Limited Liability Partnerships, Unit Trusts/Property Trusts, Co-operative Societies, Trust Bodies, Real Estate Investment Trusts/Property Trust Funds, Business Trusts, and Petroleum Income Tax Returns with accounting periods ending within the period of 1 October 2020 until 31 January 2021.

→ G7 Reach Agreement on International Tax Reforms

The G7 countries, i.e. US, Japan, Germany, France, UK, Canada and Italy, issued a statement on 5 June 2021 further to negotiations between the 139 jurisdictions in the Inclusive Framework on BEPS led by the OECD and the G20. The intention is to reach a global agreement on updated international tax rules for release at the G20 Finance Ministers meeting in early July.

If this historic tax agreement is concluded, this would be the culmination of many years of effort to seek global compromise, and would signify the biggest change to international tax rules in recent history. Although broadly welcomed by tax campaigners and labelled a moment that would change the world, months and possibly years of talks still need to take place before the rules come into force.

The proposed rules

At its core, there are two issues being addressed with two sets of rules.

The first set, the PILLAR ONE rules, involve the reallocation of taxable profits of the largest multinationals to market jurisdictions. Under the first pillar, countries where multinationals generate revenue would be awarded new taxing rights on at least 20 percent of profit exceeding a 10 percent margin for the largest and most profitable firms.

The rule, however, does not specify the scope of the market countries, how profits or margins would be determined nor the scope of the multinationals affected. The rule is also silent as to whether multinational groups with EUR 750 million group revenue should be excluded.

The rule suggests that the largest and most profitable multinationals would be required to pay tax not only where they have their headquarters but also in countries where they operate. This could affect multinational groups with group revenue ranging anywhere from EUR 750 million to EUR 20 billion.

This rule could present an alternative for market jurisdictions to implement taxation rules on the digital economy, which is currently difficult to enforce, as the market jurisdictions would be expected to have more taxing rights on the global profits of the largest multinational taxpayers.

It is being discussed that developing and resource-rich countries may be excluded from the rules, but it is not yet clear as to the actual scope of the exclusions.

One of the main concerns with this rule is the extent or level of profit that would be reallocated to market jurisdictions. The G7 release proposes that it will be at least 20 percent of the profit of a multinational group above a nominated profit threshold of 10 percent. This could mean, for example, that a multinational with over EUR 20 billion of global revenue would allocate 20 percent of its global annual profits (exceeding 10 percent return on sales) to market jurisdictions. The agreed reallocation percentage will have a major impact on the size of the pie to be reallocated to market jurisdictions and is a significant consideration for many of the 139 Inclusive Framework members.

PILLAR TWO rules propose a global minimum effective tax rate for large multinationals operating globally. The intention behind this rule is to discourage locations for business activities being chosen for the sole purpose of achieving desirable or lower tax outcomes.

The G7 committed to a global minimum tax of at least 15 percent in this regard. At this point, the rate of 15 percent is expressed as the minimum. This means that a final agreed rate may be negotiated to be higher. Currently, it is not clear as to how the calculation and imposition of the minimum tax rate will be implemented; the impact on companies; and how this will be implemented in coherence with existing international tax rules.

The key concern with this rule is whether multinational operations would be assessed in each country to see if the minimum tax rate is met. If not, a top-up tax will be imposed. This would impact countries with low corporate tax rates or those that offer generous tax incentives.

What this actually means for large multinational taxpayers

For most large multinationals, early preparation is crucial. This includes alerting boards and senior management in a timely manner to ensure a

smooth handling of the required changes if needed.

From a compliance perspective, there is a need to consider effective and timely tracking and monitoring. While the rules are not yet finalised, multinationals likely to be impacted should consider upgrades to their accounting and tax systems in conjunction with the rules.

The review of existing group structures and intra-group transactional arrangement is more important now, and early restructuring plans would be wise, especially for multinationals with presence in countries with corporate tax rates below 15 percent (e.g. Ireland, Hungary, and Cyprus).

Consequences for Malaysian taxpayers

We expect that Malaysia would support the move to make multinational companies, including tech giants, pay adequate taxes in countries where they do business. The Malaysian government should take this opportunity to strategically improve the incentive scheme to ensure multinational companies in Malaysia maintain and perhaps expand their business activities in Malaysia, and encourage new investments into Malaysia.

On this note, the Malaysian government has pro-actively taken a step in the right direction by introducing a provision relating to incentive schemes in the Malaysian Income Tax Act. This new provision, effective from the year of assessment ("YA") 2021, allows the Finance Minister to prescribe a tax rate of up to 20 percent for a certain number of years for approved activities, subject to conditions. This provides flexibility to the government to tailor incentive packages to attract the right investments into the country, while at the same time moving away from the mindset that a tax incentive means 0 tax.

Companies that fall under the Labuan tax regime, or concessionary tax rates offered under certain tax incentives may find that these fall below the global minimum tax rate of 15 percent. The consequences for such companies would need to be evaluated as legislative provisions are developed.

Awaiting official announcements and developments on steps that will be taken by local tax administrations, multinational groups that may be affected by these proposals should already start considering the potential impact for themselves and their relevant stakeholders.

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→ PEMULIH Stimulus Package

On 28 June 2021, the PEMULIH Stimulus Package valued at MYR 150 billion was announced by the Malaysia Prime Minister, with the objective of supporting business continuity, continuing the Prihatin Rakyat Agenda and increasing vaccinations.

Below please find the tax related measures announced under the PEMULIH Stimulus Package for your information.

1. Employers are allowed a tax deduction for expenses incurred on equipment and services for providing premises as vaccination centres ("PPVs"). It is not yet clear when such expenses should be incurred to qualify for the tax deduction;

2. The scope of the existing tax deduction for approved community and charitable projects in relation to Covid-19 (currently provided under Section 34(6)(h) of the Income Tax Act is expanded to include donations to the PPVs;

3. Deferment of tax instalment payments for companies in the tourism sector;

4. Service tax exemption and tourism tax exemption for hotel operators until the end of 2021;

5. The new Wage Subsidy Programme 4.0 ("WSP 4.0") will enable employers to seek subsidy of MYR 600 per employee (up to 500 employees)

for the periods during Phase 2 and Phase 3 of the National Recovery Plan. The condition for employees to earn a monthly salary of not more than MYR 4,000 is removed, but employers are now required to include the subsidy information in the employee's payslip. For Phase 2, two months subsidy can be claimed per employee for all sectors. For Phase 3, two months subsidy can be claimed per employee in sectors listed under the negative list. The application will start from 1 August to 31 October 2021. The total amount allocated under this scheme is RM 3.8 billion;

6. The existing PenjanaKerjaya programme under SOCSO which is scheduled to end in June 2021 will be extended:

    1. qualifying monthly salary reduced from MYR 1,500 to MYR 1,200 under the Malaysianisation programme;
    2. employment contract period reduced from 12 months to 6 months for employment of the disabled, ex-convicts and those aged 50 and above;
    3. the GigCareer programme extends coverage to temporary employment employees and hardcore unemployment (more than 180 days). The employee will receive MYR 600 for a maximum of 6 months; and
    4. one-off incentive payment given to direct employers for each low skilled employee hired through Private Employment Agencies at rates as follows:

    a. MYR 100 – Salary offered below MYR 3,000;
    b. MYR 200 – Salary offered above MYR 3,000; and
    c. MYR 300 – Salary offered above MYR 4,000. Applications would start from 15 July 2021 to 31 December 2021 for employees hired from 15 July 2021 onwards. Employers would also be required to post job advertisements on MyFutureJobs to be eligible for applying for the incentive payments;

7. Under PEMERKASA+ it was announced that the HRDF Levy exemption was extended to all employers registered with the HRDF for the month of June 2021. Under PEMULIH, a two months HRDF Levy exemption is provided automatically for all employers that are unable to operate during the Movement Control Order ("MCO");

8. Employers that are required to contribute to HRDF under the expanded coverage from 1 March 2021 will continue to be exempted from the HRDF Levy until 31 December 2021.

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→ Vaccination Programme in Malaysia and employee rights

In Malaysia, the vaccination programme for Covid-19 under *Program Imunisasi COVID-19 Kebangsaan (PICK)* commenced on 26 February 2021. It is provided to residents in Malaysia (citizens and non-citizens) aged 18 years and above on a voluntary basis, separated into three phases. Based on the schedule by the government, we are currently at the second phase running from April to August 2021. In addition to the Malaysia Federal Government sourcing and administering the Covid-19 vaccination, state governments are also permitted to procure their

own Covid-19 vaccines. As of today, the Selangor and Sarawak state government has been provided with such permission. There are also two models that are available for companies that has been agreed with the related Ministries and the Committee overseeing the National Vaccination Programme:

1. Public Private Partnership Immunisation Model – Only for manufacturing and related services sectors.
2. Private Immunisation Model (Special Request) for Business Travellers.

Vaccination Programmes

There are currently two main vaccination programmes ongoing to assist with PICK to speed up the process of providing vaccination to the public.

1. Selangor Vaccination Programme (Selvax) – This vaccination program is provided by the State of Selangor. Further details as follows:

- Registration commencement date: 28 June 2021;
- Only CoronaVac (Sinovac) is available;
- Eligible to all companies in Malaysia; Currently still not available to indivi-duals/families/healthcare facilities;
- Registration is done through https://vax.selangkah.my/;
- Employers to be responsible for full cost of vaccination at MYR 350 for two doses. Payments would need to be made first before the arrangements for vaccination will proceed;
- On-site administration is available for workplaces with more than 1,500 employees. If less than 1,500 em-ployees, vaccination will take place at the Vaccine Administration Centre (Pusat Pemberian Vaksinasi – PPV).

2. Program Imunisasi Industri COVID-19 Kerjasama Awam-Swasta (PIKAS) - This program falls under the public-private partnership model and would be coordina-ted through the Ministry of International Trade and Industry ("MITI") where private sectors will provide the usage of worksites, convention and exhibition centres for PPV usage for medical, non-medical and security personnel usage.

- Registration commencement date: 13 June 2021.
- Vaccines provided are the same as vaccines given under PICK. No choosing of vaccines applicable;
- Only manufactoring sector company's employees can apply;
- Registration is done through a form submission downloadable from MITI's website and submitted by respective industry associations and business chamber of commerce to vaccine4industry@miti.gov.my;
- Vaccines are free but administration fees and venue hosting fees apply per dose per employee at MYR 15 and MYR 30 respectively. If vaccinations are done on-site, the venue hosting fees would be subject to changes. Employers are responsible for the full cost of vaccination arrangements. Payment has to be fully made at least five working days before the vaccination date for on-site PPV;
- A minimum of 1,000 employees is required to request for on-site vaccine administration. Companies can combine their employees with other companies to have a collective amount of 1,000 employees. Other terms and conditions apply.

Vaccination rights and benefits

As of the time of writing, there is no statutory provisions allowing employers to compel employees to be vaccinated. Presently, the Malaysian government has not made vaccination mandatory.

Employers may request employees to provide justification for refusing vaccination. However, employees who opt out of vaccination do not need to give a reason for their decision.

The choice of vaccination is on a voluntary basis. As such, employers who compel their employees to be vaccinated may infringe on the employees´ individual rights.

Nevertheless, under the Occupational Safety and Health Act 1994 ("OHSA"), employers have a duty to provide a safe and conducive working environment. OHSA provides that an employer has an obligation to take all reasonable steps and to ensure the safety and health at the work place for all employees. Keeping that in mind, employers are encouraged to perform a Covid-19 risk assessment to identify the necessary steps required to ensure safety and health and the work place.

In conducting a COVID-19 risk assessment, employers should consider the importance of being vaccinated for their business sustainablity. Employers should take into consideration factors such as the type of industry sector, type of work perfomed and exposure to third parties.

Upon conducting a COVID-19 risk assessment and concluding that the industry is a high risk industry, a vaccination policy should be

drafted. The policy should be communicated to all employees and consent to be vaccinated must be procured.

Implementation of a mandatory vaccination policy may be justifiable in high risk industries such as construction or healthcare.

In the event of employees´ refusal to be vaccinated, employers should consider the next course of action i.e. is there an alternative solution for the sustainability of the business.

Employers are encouraged to consider providing the option of work from home where possible or enforcing frequent screening, segregation of employees or even limiting the number of employees present at the place of business to reduce the risk of employees being exposed to Covid-19.

The Ministry of Human Resource has encouraged employers to provide vaccine leaves or time off to their employees to enable employees to attend to their vaccine appointments. Ultimately the decision to provide time off or leave is at the employer´ s discretion.

In light of the importance of the employee being vaccinated particularly in high risk industries, employers may conduct awareness campaigns on the importance of vaccination and introduce incentives available for those vaccinated. However, it is important to highlight during such campaign that the employer does not warrant the safety of the vaccine and that the decision to be vaccinated lies with the employee.

It is not mandatory for employers to have a Covid-19 compensation fund in place for their employees.

The Malaysian government has introduced a compensation fund for individuals who developed side effects from being vaccinated. Individuals that suffer from serious side effects that requires long term treatment in hopital stand to receive MYR 50,000, and individuals who suffer from permanent impairement and death are entitled to MYR 500,000.

Moving forward, employers are advised to introduce the requirement of vaccination into their employment contracts for new employees. As for existing employees, an introduction of such clause would require consent from the employee as it is a condition to be satisfied now, hence a fundamental change in the employment contract.

Termination of an employee on the grounds of refusal to be vaccinated has yet to be tested in Malaysian courts. Employers should ensure that the decisoin to terminate is justifiable.

Employers are encouraged to stay up to date on developments on the rights of employees as they are evolving at fast pace, and to seek legal advice before implementing any changes to policies or employment contracts.

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→ Update for PETRONAS licensing and registration guidelines

PETRONAS has issued latest General Guidelines dated 10 June 2021. The General Guidelines now provide an alternative avenue for foreign companies to participate in the business of supplying goods and services to the upstream industry in Malaysia.

Previously, foreign companies were permitted to participate in tenders in the Malaysian oil and gas industry by either:

- Appointing a local company as Agent to serve as local representative and service provider. It is mandatory for the appointed Agent to have a PETRONAS License or Registration. Foreign companies are encouraged to select a local agent from the existing PETRONAS Licensed or Registered vendors to ensure that PETRONAS License or Registration requirements are fully met;

  OR

- Forming a Joint Venture (JV) company with a local company or individual. It is mandatory for the JV company to have the PETRONAS License or Registration.

With the latest General Guidelines issued, foreign companies may now participate by forming a local branch. The local branch MUST apply for the PETRONAS License or Registration. The application must comply with the General Guidelines provide by PETRONAS.

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