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Latest News on Law, Tax and Business in Malaysia

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## → Finance Bill 2020

This issue is a continuation of the Budget 2021, highlighting the key tax proposals based on the Finance Bill 2020 which has only been presented during the Budget Speech in November 2020.

### Key Tax Proposals

#### Corporate Income Tax

##### DEDUCTIONS FOR RESEARCH AND DEVELOPMENT (R&D) EXPENDITURE

Currently, a person is allowed to claim:

- a. A tax deduction on R&D expenditure (excluding capital expenditure for the acquisition of any rights in or over any property) which is incurred in relation to the business of the person;
- b. A double deduction on cash contributions made to an approved research institute or payment for the use of services of an approved research institute or approved research company;
- c. A double tax deduction in respect of expenditure (excluding capital expenditure or expenditure of the acquisition of any rights in or over any property) incurred by the person on R&D activities approved by the MOF.

The term “person” presently does not preclude a non-resident from being eligible for the above benefits. It is proposed though that the above incentives a) to c) would only be granted to a Malaysian tax resident.

It is also proposed that the tax deduction claim under c) will be subject to the following restrictions where there are R&D expenses incurred outside Malaysia in the basis period for a YA:

- a) A double deduction if the R&D expenses incurred outside Malaysia is less than or equal to 30 per cent of the total R&D expenses; and
- b) A single deduction if the R&D expenses incurred outside Malaysia is more than 30 per cent of the total R&D expenses.

##### DEFINITION OF PLANT FOR CAPITAL ALLOWANCES (CA) PURPOSES

The term “plant” is currently not defined under the Income Tax Act and its meaning is currently derived from case laws which generally describe

“plant” as an apparatus used by a business to exercise its business activities.

It is proposed that a definition of “plant” be inserted into the Income Tax Act as “an apparatus used by a person to exercise their business, but not including a building, an intangible asset or any asset used that functions as a place within which a business is exercised”.

##### POWER TO DISREGARD STRUCTURES ADOPTED

Currently, there is a specific provision empowering the Director General to disregard and make adjustments to any structure adopted by a person for transfer pricing purposes.

A new Section 140A(3A) is proposed to be introduced to empower the Director General to disregard any structure adopted by a person if:

- The economic substance of that transaction differs from its form; or
- The form and substance of that transaction are the same but the arrangement made in relation to the transaction, viewed in totality, differs from those which would have been adopted in an arm’s length situation.

The Director General shall make adjustments to the structure of that transaction as he considers suitable to reflect the structure that would have been adopted by an independent person dealing at arm’s length with regard to the economic and commercial reality.

##### NEW SURCHARGE OF TRANSFER PRICING ADJUSTMENTS AND STRUCTURES

Currently, where Transfer Pricing adjustments are made by the Director General, the taxpayer is only subject to a penalty if the Transfer Pricing adjustments result in additional tax payable.

It is proposed that a surcharge of up to 5 per cent of the total Transfer Pricing adjustments be imposed whether or not the adjustments result in additional tax payable. The surcharge shall be treated as tax payable for the purposes of tax payment and recovery of the tax payment by civil suit. The Director General is given the discretion to remit the surcharge. The proposed surcharge is also applicable to adjustments made in relation to structures disregarded by the Director General under the new Section 140A(3A).

## PENALTY FOR FAILURE TO FURNISH CONTEMPORANEOUS TRANSFER PRICING DOCUMENTATION

Currently, there is no specific provision in the Income Tax Act that penalizes a taxpayer who fails to furnish contemporaneous transfer pricing documentation on time, typically within 30 days of a written notice of request by IRB.

A new section is proposed to impose the following penalties for failure to furnish transfer pricing documentation on time:

	PROPOSED PENALTY
On conviction	Penalty of RM20,000 - RM100,000 or prison term of up to 6 months or both; Furnish TP documentation within 30 days or any other period decided by the Court
If no prosecution	Penalty of RM20,000 - RM100,000

## GROUP RELIEF

Currently, a company resident and incorporated in Malaysia, i.e. surrendering company, may be subject to surrender conditions of up to 70 per cent of its current year business loss for 3 consecutive YAs from the commencement of operations to a related company which is resident and incorporated in Malaysia, i.e. claimant company.

An amendment is proposed to Section 44A(3)(c) of the Income Tax Act to clarify that for a surrendering company and claimant company to be related companies for group relief purposes, 70 per cent of the paid-up ordinary share capital of the surrendering company and claimant company that is held indirectly must be owned through the medium of a company resident and incorporated in Malaysia.

## RESTRICTION ON TAX DEDUCTION IN RESPECT OF PAYMENTS MADE TO A LABUAN COMPANY

With effect from 1 January 2019, residents are subject to the following restriction on the amount of tax deduction in respect of payments made to a Labuan company:

TYPES OF PAYMENTS	INCOME TAX (DEDUCTIONS NOT ALLOWED)	REVISED PERCENTAGES
Interest	33 %	25 %
Lease rental	33 %	25 %
Other payments	97 %	97 %

A Labuan company is currently defined as a Labuan entity which has met the prescribed number of full time employees in Labuan and annual operating expenditure in Labuan i.e. meets the substantial activities requirements. A resident who makes payment to a Labuan entity not meeting the substantial activities requirements is not subject to the restriction on tax deduction.

Effective from 1 January 2021, it is proposed that the restriction on the amount of tax deduction shall be extended to cover payments made to Labuan entities which do not meet the substantial activities requirements.

## WITHHOLDING TAX ON DISTRIBUTION OF INCOME FROM REAL ESTATE INVESTMENT TRUSTS (REITS) OR PROPERTY TRUST FUNDS (PTFS)

Currently, the withholding tax deducted at REITs/PTFs level in respect of the income distributed to the unit holders is generally regarded as a final tax i.e. unit holders are not required to declare the income distribution in their tax returns based on the IRB's current practice, except in case of resident corporate unit holders where the withholding tax provisions under Section 109D of the ITA are not applicable, and REITs/PTFs that are not exempted from tax under Section 61A(1) of the ITA, and the income distributed carries a tax credit.

An amendment to the provision in the ITA is proposed to give effect to the IRB's practice of regarding the withholding tax deducted from the income distributed by REITs/PTFs as a final tax. In this respect, the income of unit holders which is subject to withholding tax is disregarded for the purpose of ascertaining the chargeable income of the unit holders.

## Tax Incentives

### TAX TREATMENTS FOR APPROVED INCENTIVE SCHEMES (AIS)

Provisions for Incentive Schemes approved by the Minister of Finance are to be introduced into the Income Tax Act under Section 65B. AIS includes:

- Any high technology activity in manufacturing and services sector; and
- Any other activities which would benefit the economy of Malaysia.

A qualifying person will be granted a concessionary tax rate prescribed by the Minister of Finance of no more than 20 per cent of chargeable income.

The AIS provisions are applicable to the Principal Hub, Global Trading Centre, companies relocating to Malaysia, and companies manufacturing pharmaceutical products.

## INCOME TAX REBATE FOR NEW SMES AND LIMITED LIABILITY PARTNERSHIPS (LLPS)

The income tax rebate for new SMEs are extended to LLPs. The conditions are:

- The company/LLP is resident and incorporated/registered in Malaysia;
- Commenced operations on or after 1 July 2020, but not later than 31 December 2021;
- Has paid up capital/capital contribution of not more than RM2.5 million at the beginning of the basis period for a YA and has gross income from business not exceeding RM50 million for the YA.

The tax rebate is equivalent to the capital or operating expenditure incurred in each YA, subject to a maximum amount of RM20,000 for each YA, for a period of 3 consecutive years from the YA of commencement of operations.

Any unutilized tax rebate in a YA cannot be refunded or carried forward and shall be disregarded permanently.

The entitlement for the rebate for that YA and subsequent YAs shall cease where the qualifying conditions are not met in a YA.

## SPECIAL REINVESTMENT ALLOWANCE (RA)

It is proposed that a second round of special RA be given to qualifying companies that reinvest in YA 2020 to YA 2022.

## Labuan

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### DEFINITION OF CHARGEABLE PROFITS

With effect from YA2020, Labuan entities which do not meet the prescribed substantial activities requirements are subject to tax at 24 per cent on its chargeable profits under the Labuan Business Activity Tax Act 1990 (LBATA).

It is provided that the 'chargeable profits' for Labuan Entities which are subject to tax at 24 per cent under LBATA is defined as "net profits as reflected in the audited accounts in respect of such Labuan business activity of the Labuan entity for the basis period for that year of assessment".

### CONTROL AND MANAGEMENT REQUIREMENT IN RELATION TO LABUAN NON-TRADING ACTIVITY

Currently, a Labuan entity which qualifies for the preferential treatment under LBATA is defined as a Labuan entity which meets the substantial activities requirement. The substantial activities requirement consists of a prescribed number of full time employees in Labuan and annual operating expenditure in Labuan.

It is proposed that for a Labuan non-trading activity to continue to enjoy the preferential treatment, it has to fulfill an additional requirement, i.e. compliance with prescribed conditions in relation to control and management in Labuan.

### RIGHT TO APPEAL AGAINST ADDITIONAL ASSESSMENT UNDER LBATA

Currently, a Labuan entity which is aggrieved by an assessment raised by the Director General based on tax returns submitted may appeal against the assessment to the Special Commissioners of Income Tax.

It is proposed that the right to appeal be extended to cover additional assessment raised by the Director General.

### DIRECTOR GENERAL'S POWER TO GRANT EXTENSION OF TIME (EOT) FOR ELECTION TO BE TAXED UNDER ITA 1967

A Labuan entity is given an option to make an irrevocable election to subject its profits to tax under ITA 1967 instead of LBATA. The election is to be submitted to the DG within 3 months after the beginning of the basis period for a YA.

It is proposed that a provision be inserted into LBATA to empower the DG to grant EOT for the submission of the election.

## Real Property Gains Tax

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### REVIEW OF RATE OF RETENTION SUM BY AN ACQUIRER

Currently, gains from disposal of real property and shares in Real Property Companies are subject to RPGT at the rates of 5 per cent to 30 per cent, depending on the category of the disposer and the period of ownership.

It is proposed that the 7 per cent rate that is currently applicable when the disposer is a non-citizen, a non-permanent resident or a company incorporated outside of Malaysia, be extended to cases where the disposer is an executor of the estate of a deceased person who is not a citizen and not a permanent resident.

### POWER OF DIRECTOR GENERAL TO REMIT SUM IMPOSED ON A DISPOSER FOR GIVING INCORRECT NOTIFICATION OF NON-CHARGEABILITY TO AN ACQUIRER

Currently, the acquirer of Malaysian real property or shares in Real Property Companies is required to retain part of the purchase consideration and remit the retention sum to the IRB within a stipulated deadline. Failure to withhold and remit the above

retention sum due to an incorrect or wrong notification furnished by the disposer may result in the imposition of a penalty equivalent to 10 per cent of the tax payable by the disposer. The 10 per cent penalty shall be included in the RPGT assessment made in respect of the disposer.

With effect from 1 January 2021, it is proposed that the Director General be given power to remit the whole or any part of the above penalty and refund any penalty that has been paid in relation to the above remission.

## Stamp duty

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### MINISTERIAL EXEMPTION OF STAMP DUTY

Currently, MoF may grant special exemption of stamp duty on instruments in relation to any "scheme".

It is proposed that MoF may grant special exemption on any instruments. The proposed provision does not include the requirement for the instruments to be related to any scheme.

### IRB TO BE EMPOWERED TO GRANT REMISSION OF STAMP DUTY

Currently, only MoF may grant special exemption, reduction and remission of stamp duty.

It is proposed that the IRB is to be empowered to grant special remission (wholly or partly) of stamp duty on grounds of poverty and to refund any duty which has been paid in respect of such special remission.

### DIGITAL STAMPING

It is proposed that a dutiable instrument is also considered to be duly stamped and paid (including and penalty) by way of a digital stamping.

## Tax administration

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### E-FILING FOR LLP

Presently, an LLP may submit their tax return either by way of manual filing or electronic filing.

It is proposed that an LLP shall file its tax return to the DG in the prescribed form on an electronic medium or by way of electronic transmission.

### NOTIFICATIONS FROM EMPLOYERS ON THE DEATH OF EMPLOYEES

Currently, employers are required to give written notification to IRB in relation to its employees within 1 month after commencement of employment, before cessation of employment or before expected date of departure.

It is proposed that the notification to IRB shall be made via prescribed forms, and it shall also required to give written notification to inform the IRB on the death of an employee and the existing deadlines of 1 month from or before the respective events are to be revised to 30 days.

### STOPPAGE ORDER TO PREVENT PERSONS FROM LEAVING MALAYSIA

Currently, the DG may issue a certificate containing particulars of the tax, sums and debts to a Commissioner of Police or Director of Immigration seeking assistance to prevent a taxpayer from leaving Malaysia unless all the tax due and payable is settled.

It is proposed that the notification of the certificate to the Commissioner of Police or Director of Immigration may be issued through an electronic medium or by way of electronic transmission.

The above provision will be inserted in the ITA, RPGT Act and Stamp Act.

### PAYMENT OF TAXES

It is proposed that where a taxpayer has instigated any proceedings against the Government of DG under any other written law, it shall not relieve the tax payer from payment of any tax or any debt that is due and payable by them.

The above proposal would apply to taxes and debt payable under the ITA, RPGT Act, Petroleum (Income Tax) Act 1967 and LBATA effective from 1 January 2021.

## Contact for further information

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