



e-TAX NEWS

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Withholding Tax on Digital Advertising paid to Non-Resident

Subsequent to the issuance of Income Tax (Exemption) (No 9) Order 2017 (PU Order) on 24 October, 2017, income received by non-resident under Section 4A(i) and Section 4A(ii) of the Income Tax Act, 1967 (ITA) will not be subject to withholding tax if the services are rendered outside Malaysia. The above PU Order was issued on 24 October, 2017 and is effective retrospectively from 6 September, 2017. The latest development on withholding tax is the issuance of Practice Note 1/2018 by the Inland Revenue Board (IRB) on the tax treatment on digital advertising provided by a non-resident. The said practice note is issued to address the concern whether digital advertising is classified under “payment for services”, hence not subject to withholding tax if the services are rendered outside Malaysia, or the above payment falls under the scope of royalty and be subject to withholding tax.

As per the clarification provided in the said practice note, the main criteria to determine whether withholding tax under Section 109 as royalty or Section 109B as services applies are as follows:-

- Subject to Section 109 of the ITA, if it is for the purchase or use of (for example) an application (Apps) by the payer that allows the payer to create their own advertisement campaign; or
- Subject to Section 109B of the Act, if it does not involve the purchase or use of an Apps but merely a provision of service by the non-resident. In this case, the payer solely relies on the service provider to deal with all aspects of digital advertising.

Editor's Comments

A quick recap here on the expansion of withholding tax on payment made for Royalty, effective from 17 January, 2017, to include items such as, software, communication via satellite and for the use or the right to use copyrights in artistic, scientific works or etc.

In the current digital economy, the use of software/application is the norm in most business transactions with practically no human intervention or in other words, the services are rendered through the use of self-service software only. With the issuance of the above practice note, it appears that the IRB has adopted a very wide interpretation of the scope of Royalty or a rather restrictive scope of services for withholding tax purpose. As such, any services rendered through the use of self-service software with no human intervention should be classified under Royalty instead of services based on the above clarification. Moving forward, online registration of domain name, online creation / registration of blog / website, cloud storage, online marketing tools, online hosting services and etc. will immediately come to my mind as some of the payments made to non-resident that will fall within the ambit of withholding tax under Royalty.

Form MNE (PIN 1/2017) : Transfer Pricing Information on Cross Border Transactions Form

The IRB has issued a revision of the Transfer Pricing Guidelines 2012 to align to the existing guidelines with Action 13 of the OECD's BEPS report. Subsequent to the above amendments made, the IRB has issued a revised Form MNE [Pin 1/2017]. Form MNE is a data collection form on related party transaction issued by the IRB to selected taxpayers in order to perform a risk assessment for Transfer Pricing audit. In practice, the IRB will request for completion of the above form within 30 days. The revised Form MNE [Pin 1/2017] required disclosure of more comprehensive and detailed information to be in line with the suggestions and amendments proposed under the BEPS project as follows:

- Details of related parties and their respective countries and any transaction with related parties in countries having a lower tax rate compared to Malaysia;
- Any business restructuring during the last five years;
- Details relating to Research and Development (R&D) activities performed in Malaysia;
- Details relating to financial assistance received by taxpayers from related parties;
- Legal owner and location of related party within the Group who owns trade/ brand name or IP;
- Details of related companies within the group that performing R&D activities;
- Details of related party transactions both within Malaysia and outside Malaysia.

Editor's Comments

The revision of the Transfer Pricing Guidelines 2012 to be in line with the BEPS report and also the revised Form MNE [Pin 1/2017] have reaffirmed the attention of the IRB on Transfer Pricing related issues in future tax audit. We believe the declaration made by taxpayer on the availability of Transfer Pricing documentation and the disclosure of related party transactions in the Form C couple with the information collated from the revised Form MNE [Pin 1/2017] will serve as the risk assessment by the IRB for selection of taxpayers for conducting tax audit purposes. Therefore, full compliance on preparation of contemporaneous Transfer Pricing documentation is no longer an option in order to mitigate any future Transfer Pricing audit risk or any potential Transfer Pricing adjustment. In addition, with the extensive information required under the revised Form MNE [Pin 1/2017], proper due care must be exercised by taxpayers in completing the relevant information required, especially those related to R&D activities which may trigger potential tax audit risk.

Filing of Employer's Tax Return for Dormant Company

With effect from Year of Assessment (YA) 2014, Companies which are dormant* and/or have not commenced business are required to furnish Return Form of an Employer (Form E). The IRB has announced that all companies (including Labuan companies) are mandatory to submit Form E via e-filing for the Year of Remuneration 2016 and onwards in accordance with subsection 83(1B) of the ITA. Form E will only be considered complete if C.P. 8D is furnished before or on the due date for submission of the form.

Form E, if submitted manually by a Company (including Labuan companies), will be deemed not received for such purposes under subsection 83(1B) of the ITA and it is an offence under Paragraph 120(1)(b) of the ITA. Upon conviction, employers may be liable to a fine of not less than RM200 and not more than RM20,000 or to imprisonment for a term not exceeding 6 months or to both.

*Note:-

For the above purpose, 'dormant' means:-

- Never commenced operations since the date it was incorporated / established; or
- Had previously been in operation or carried on business but has now ceased operations or business.

Editor's Comments:

All companies incorporated in Malaysia (including Labuan companies) are compulsory to complete and file Form E on or before the due date, even if it is dormant, under liquidation or has no employees.

Employers can apply to the IRB for non-filing of the Form E via a letter if they are no longer active, has no employee or are under liquidation so that the IRB can update its records. However, this application is subject to the IRB's approval and application must be submitted prior to the expiry of the due date of submission. Failure to notify IRB may result in the issuance of compound notice for non-filing of the Form E.

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