



**INLAND REVENUE BOARD MALAYSIA**

**FOREIGN NATIONALS WORKING  
IN MALAYSIA –  
TAX TREATY RELIEF**

**PUBLIC RULING NO. 2/2012**

*Translation from the original Bahasa Malaysia text*

**DATE OF ISSUE: 3 MAY 2012**



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**DIRECTOR GENERAL'S PUBLIC RULING**

A Public Ruling as provided for under section 138A of the Income Tax Act 1967 is issued for the purpose of providing guidance for the public and officers of the Inland Revenue Board Malaysia. It sets out the interpretation of the Director General of Inland Revenue in respect of the particular tax law, and the policy and procedure that are to be applied.

A Public Ruling may be withdrawn, either wholly or in part, by notice of withdrawal or by publication of a new ruling which is inconsistent with it.

**Director General of Inland Revenue,  
Inland Revenue Board Malaysia.**

INLAND REVENUE BOARD MALAYSIA

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1. This Ruling explains the application of tax treaty relief to foreign nationals from treaty countries seconded to Malaysia by their employers that are not resident in Malaysia.
2. The provisions of the Income Tax Act 1967 (ITA 1967) related to this Ruling are sections 2, 7, 13, 25, 132, Schedules 6 and 7.
3. The words used in this Ruling have the following meaning:-
  - 3.1 “Non-resident” for a basis year for a year of assessment in relation to an employee means an employee other than a resident employee.
  - 3.2 “Foreign tax” means any tax on income (or any other tax of a substantially similar character) chargeable or imposed by or under the laws of a territory outside Malaysia.
  - 3.3 “Malaysian tax” means tax imposed by the ITA 1967.
  - 3.4 “Seconded” means –
    - a) an employee is transferred temporarily by the employer to perform duties elsewhere; and
    - b) after the completion of his temporary duties the employee returns to the same employer to continue his employment
  - 3.5 “Bilateral credit” means credit in respect of foreign tax which, by virtue of any arrangements has effect under section 132 of the ITA 1967, is to be allowed as credit against Malaysian tax.
  - 3.6 “Employer” in relation to an employment, means –
    - (a) where the relationship of master and servant subsists, the master;
    - (b) where the relationship does not subsist, the person who pays or is responsible for paying any remuneration to the employee who has the employment, notwithstanding that that person and the employee may be the same person acting in different capacities.
  - 3.7 “Person” includes a company, a co-operative society, a club, an association, a Hindu Joint Family, a trust, an estate under administration, a partnership and an individual.
  - 3.8 “Employee” in relation to an employment, means –
    - (a) where the relationship of servant and master subsists, the servant;

(b) where the relationship does not subsist, the holder of the appointment or office which constitutes the employment.

3.9 “Resident of Malaysia” means resident in Malaysia for the basis year for a year of assessment by virtue of section 7 of the ITA 1967.

3.10 “Employment” means –

(a) employment in which the relationship of master and servant subsists;

(b) any appointment or office, whether public or not and whether or not that relationship subsists, for which remuneration is payable.

3.11 “Foreign income” means income derived from outside Malaysia. For the purpose of bilateral credit, foreign income includes income derived from Malaysia charged to foreign tax.

3.12 “Statutory income”, in relation to a person, a source and a year of assessment, means statutory income ascertained in accordance with the ITA 1967.

3.13 “Foreign national” means an individual who is a non-Malaysian citizen.

#### 4. Tax Treaties

##### 4.1 Double taxation

When a foreign national derives employment income from Malaysia but is a resident of another country, income tax may be payable in Malaysia and the country of residence.

##### 4.2 Double Taxation Avoidance Agreement

The Malaysian Government has entered into Agreements for the Avoidance of Double Taxation (DTA) with a number of other countries in order to eliminate instances of double taxation should the same income be subject to tax in more than one country.

##### 4.3 Employment Article / Dependent Personal Services Article in the DTA

For foreign nationals exercising employment in Malaysia due to a secondment, the Dependent Personal Services (DPS) Article of the relevant Malaysian DTA or tax treaty is applicable for tax treaty relief. However, the precise terms of the DPS Article in each DTA may vary from country to country. The full text of the relevant Malaysian DTAs are available on the Inland Revenue Board Malaysia’s website at <http://www.hasil.gov.my>.

4.4 Provisions of the DPS Article

- a) The DPS Article allocates taxing rights to the country of source, which is where the employment is exercised or the country of residence (where the employee is resident) on income from employment.
- b) The general rule in this Article states that income from employment derived by an individual who is a resident of a contracting country (e.g. Singapore) may be taxed in the other country (e.g. Malaysia) if the employment is exercised in that other country (Malaysia).
- c) However, where the employment in the other country (e.g. Malaysia) is for short term purposes and for the facilitation of movement of qualified personnel, exemption of tax is granted by the country of source where the employment is exercised (Malaysia) if all of the following three conditions are satisfied (these conditions may vary from one DTA to another):-

- (i) Not exceeding the 183 days period

The foreign national is present in Malaysia for a period or periods not exceeding 183 days in aggregate in the fiscal / calendar year concerned; or

The foreign national is present in Malaysia for a period or periods not exceeding 183 days in aggregate in any 12 month period commencing or ending in the fiscal year concerned.

- (ii) Payer is a non-resident

The remuneration of the foreign national working in Malaysia is paid by or on behalf of an employer who is not a resident of Malaysia.

- (iii) Remuneration is not borne by a resident or permanent establishment (PE) in Malaysia

The remuneration of the foreign national working in Malaysia is not borne by a PE or a fixed base which the foreign employer has in the other state (Malaysia). In other words, the remuneration is not charged as a deductible expense in the Profit and Loss account of the PE which the foreign employer has in Malaysia.

For this purpose, the terms **remuneration** and **borne by** in the DPS Article in the relevant DTAs have the following meaning:-

- **remuneration** means salaries, wages and other similar remuneration which includes benefits in kind received in respect of an employment; and
- **borne by** means that the remuneration is allowable as a deduction for tax purposes and not merely as a deduction from the profits of the PE.

If any of the above three conditions are not satisfied, the employment income of the foreign national will be subject to tax in Malaysia. The taxable income is the remuneration attributable to the period of employment in Malaysia.

## 5. Application Of The DPS Article

The following is an explanation of the conditions in the DPS Article that are to be satisfied to be eligible for tax exemption in the country of source:-

### (a) Condition 1 - Not exceeding the 183 days period

The foreign national is present in Malaysia for a period or periods not exceeding 183 days in aggregate in the fiscal / calendar year concerned; or

The foreign national is present in Malaysia for a period or periods not exceeding 183 days in aggregate in any 12 month period commencing or ending in the fiscal year concerned.

When considering the 183 days period, the word **day** includes any day or part of a day of the calendar / fiscal year on which the person was physically present in Malaysia, regardless of the number of hours present, including holidays and weekends. The interpretation of this condition depends on the manner in which the provision is drafted. Satisfaction of this condition depends on individual circumstances.

### Example 1

Smith is a United Kingdom (UK) resident who is employed by a UK based company. He has been sent by his employer to render services in Malaysia from 1.4.2009 to 31.7.2010. He was present in Malaysia for 150 days from 1.4.2009 to 31.3.2010 but for the period 1.8.2009 to 31.7.2010, he was present in Malaysia for 210 days.

Reference is made to Article 16(2) of the DTA between Malaysia and UK which reads as follows:-

“Notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment

exercised in the other Contracting State shall be taxable only in the first mentioned State if:-

- (a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned; and ....”

<b>Determining Whether Condition 1 Of The DPS Article Is Satisfied</b>	
1	<p>Employment Period in Malaysia</p> <p style="text-align: center;">←-----&gt;</p> <p style="text-align: center;"><b>1.4.2009</b> <span style="float: right;"><b>31.7.2010</b></span></p> <p style="text-align: center;">(Commence employment) <span style="float: right;">(Cease employment)</span></p>
2	<p>Days of physical presence in Malaysia during the 12-month period that <b>begins</b> in the relevant fiscal year</p> <p style="text-align: center;">Physically present for a period of 150 days</p> <p style="text-align: center;">←-----&gt;</p> <p style="text-align: center;"><b>1.4.2009</b> <span style="float: right;">31.3.2010</span></p> <p>Smith is physically present in Malaysia for only 150 days which is less than 183 days in the 12-month period (i.e. from 1.4.2009 to 31.3.2010) commencing from 1.4.2009.</p>
3	<p>Days of physical presence in Malaysia during the 12 month period that <b>ends</b> in the relevant fiscal year</p> <p style="text-align: center;">Physically present for a period of 210 days</p> <p style="text-align: center;">←-----&gt;</p> <p style="text-align: center;">1.8.2009 <span style="float: right;"><b>31.7.2010</b></span></p> <p>Smith is physically present in Malaysia for 210 days which exceeds 183 days in a 12-month period ending on 31.7.2010 (i.e. from 1.8.2009 to 31.7.2010). Therefore <b>condition 1 is not satisfied</b>.</p>

4	Although Smith is physically present in Malaysia for less than 183 days in the 12-month period commencing from 1.4.2009 but he is physically present in Malaysia for more than 183 days in the 12 month period ending on 31.7.2010. Therefore <b>condition 1 of Article 16(2) of the DTA between Malaysia and the UK is not satisfied.</b> Smith does not qualify for tax exemption in Malaysia.
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### Observation

In Example 1, Smith is physically present in Malaysia for 210 days in the 12 month period (1.8.2009 to 31.7.2010) ending on 31.7.2010 in the fiscal year concerned. **If Smith is physically present in Malaysia for 180 days and not 210 days in the period from 1.8.2009 to 31.7.2010, condition 1 is satisfied.**

Condition 1 is satisfied if Smith has satisfied the condition of being physically present in Malaysia for a period that does not exceed 183 days in both the 12-month periods:-

- (i) commencing from 1.4.2009 in the fiscal year concerned (150 days); and
- (ii) ending on 31.7.2010 in the fiscal year concerned (180 days).

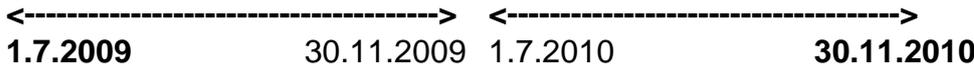
### Example 2

John is a United Kingdom (UK) resident who is employed by a UK based company. He was sent to Malaysia for 2 separate periods, i.e. from 1.7.2009 to 30.11.2009 (153 days) and 1.7.2010 to 30.11.2010 (153 days).

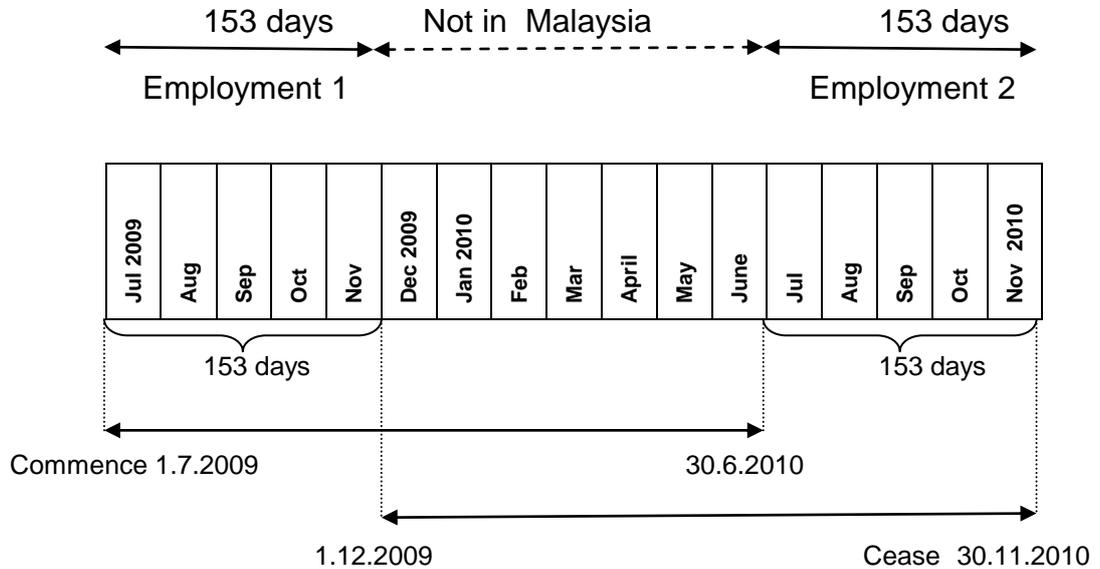
Reference is made to Article 16(2) of the DTA between Malaysia and UK which reads as follows:-

“Notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned State if:-

- (a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned; and ....”.

<b>Determining Whether Condition 1 Of The DPS Article Is Satisfied</b>	
1	<p>Periods of employment in Malaysia</p> <p style="text-align: center;">1st Employment Period                      2nd Employment Period</p> <p style="text-align: center;">153 days    153 days</p> <p style="text-align: center;">  </p>
2	<p>Days of physical presence in Malaysia during the 12-month period that <b>begins</b> in the relevant fiscal year</p> <p style="text-align: center;">  </p> <p>John is physically present in Malaysia for 153 days which does not exceed 183 days in the 12-month period (i.e. from 1.7.2009 to 30.6.2010) commencing from 1.7.2009.</p>
3	<p>Days of physical presence in Malaysia during the 12 month period that <b>ends</b> in the relevant fiscal year</p> <p style="text-align: center;">  </p> <p><i>John is physically present in Malaysia for 153 days which does not exceed 183 days in the 12-month period ending on 30.11.2010.</i></p>
4	<p><i>John is physically present in Malaysia for a period not exceeding 183 days for both the 12-month periods commencing from 1.7.2009 and ending on 30.11.2010. Therefore <b>condition 1 of Article 16(2) of the DTA between Malaysia and UK is satisfied.</b> John qualifies for tax exemption in Malaysia.</i></p>

The situation is summarised as follows:-



(b) Condition 2

The remuneration of the foreign national working in Malaysia is paid by or on behalf of an employer who is not a resident of Malaysia.

The second condition is that the employer paying the remuneration must not be a resident of the country where the employment is exercised. This includes a situation where a foreign national seconded by his non-resident employer to its subsidiary in Malaysia or a company resident in Malaysia (deemed employer) is paid by the non-resident employer on behalf of a deemed employer in Malaysia.

For this purpose, the terms **paid by** and **paid on behalf of** in the DPS Article in the relevant DTAs have the following meaning:-

- (i) **paid by** refers to an employer actually paying the remuneration and also bearing the cost thereof because the employer claims a deduction of the salary as a business expense; and
- (ii) **paid on behalf of** refers to an employer ultimately bearing the salary cost where someone else (e.g. paying agent or an affiliated company) paid such salary to the employee.

**Example 3**

Donald, an engineer and a resident in the UK, works for ABC Engineering Ltd, a company resident in the UK. ABC Engineering Ltd employs a number of engineers on a full-time basis. XYZ Sdn Bhd, an engineering company in Malaysia needs the temporary services of an engineer to complete a contract on a construction site in Malaysia. ABC Engineering Ltd agrees with XYZ Sdn Bhd that Donald who is momentarily not assigned to any contract, will work for XYZ Sdn Bhd from 1.4.2011 to 31.7.2011. During the 4-month period Donald will work under XYZ Sdn Bhd’s contract under the direct supervision and control of XYZ Sdn Bhd’s senior engineer.

XYZ Sdn Bhd will pay ABC Engineering Ltd an amount equal to the remuneration, allowances, contributions and other employment benefits payable to Donald for the 4 month period together with a 10% commission. XYZ Sdn Bhd also agrees to indemnify ABC Engineering Ltd for any potential claims related to Donald’s work during the 4 month period.

The work performed by Donald at the construction site in Malaysia is performed on behalf of XYZ Sdn Bhd rather than ABC Engineering Ltd. XYZ Sdn Bhd exercises direct supervision and control over the work performed by Donald, takes responsibility for Donald’s work and bears the cost of his remuneration during the 4 month period. It can be concluded that Donald is in an employment relationship with XYZ Sdn Bhd. As Donald’s remuneration is paid by XYZ Sdn Bhd, a company resident in Malaysia, **condition 2 is not satisfied.**

In this context, it is considered that ABC Engineering Ltd paid the remuneration without bearing the cost of this expense. ABC Engineering Ltd recharged the cost of Donald’s remuneration to XYZ Sdn Bhd resulting in the actual cost being borne by XYZ Sdn Bhd.

**Observation**

In determining whether condition 2 is satisfied, the various factors in the following scenarios should be considered –

Scenario	Factors
1	If the facts in Example 3 are the same except that Donald’s remuneration continues to be paid and borne by ABC Engineering Ltd for the duration of his 4 month employment in Malaysia and no remuneration or allowances are paid and borne by XYZ Sdn Bhd, <b>condition 2 is satisfied</b> as the remuneration is paid by ABC Engineering Ltd, a non-resident in Malaysia.

2	<p>If Donald's remuneration continues to be paid by ABC Engineering Ltd for the duration of his 4 month employment in Malaysia but the cost is recharged to XYZ Sdn Bhd, <b>condition 2 is not satisfied</b> as the remuneration is ultimately paid and borne by XYZ Sdn Bhd, a resident in Malaysia.</p>
3	<p>If the facts in Example 3 are the same except that Donald's remuneration continues to be paid and borne by ABC Engineering Ltd and allowances including the benefits in kind (BIK) are paid and borne by XYZ Sdn Bhd, <b>condition 2 is not satisfied</b> as part of the remuneration (allowances and BIK) are paid and borne by XYZ Sdn Bhd, a resident in Malaysia.</p> <p>Donald is subject to tax in Malaysia on the income attributable to his employment in Malaysia (which includes the remuneration paid by ABC Engineering Ltd and the allowances and BIK paid by XYZ Sdn Bhd).</p>

(c) Condition 3

Remuneration is not borne by a resident or PE in Malaysia.

This condition will not be satisfied if the remuneration is deducted as an allowable expense in calculating the taxable income of a non-resident employer who has a PE or fixed base in Malaysia. In determining whether the non-resident employer has a PE in Malaysia, substantiating facts and evidence would be required.

Note:-

Even though a claim for deduction for the remuneration is not made by the non-resident employer in computing the profits attributable to the PE or the fixed base in Malaysia, this does not mean that the remuneration is not borne by the PE or the fixed base that the non-resident employer has in Malaysia. Among the reasons that a non-resident employer may not claim a deduction for the remuneration paid to his employee are:-

- (i) the PE or fixed base in Malaysia is exempt from tax in Malaysia; and
- (ii) the employer simply decided not to make a claim for a deduction to which he was entitled.

**Example 4**

Patrick, a project consultant from UK, was seconded by his employer in the UK to a branch office in Malaysia which has PE in Malaysia. Patrick was in Malaysia from 1.7.2010 to 31.10.2010 (123 days). Patrick’s remuneration continued to be paid by the employer in the UK. The Malaysian branch office paid him some allowances. The allowances paid by the PE in Malaysia are not claimed as an allowable deduction in computing the profits attributable to the PE. For the purpose of this example, it is assumed that the Malaysian branch is exempt from tax in Malaysia.

In this case, the PE in Malaysia did not claim the allowances paid to Patrick as a deduction in computing the profits attributable to the PE because the PE is tax-exempt in Malaysia. However, as the allowances are actually borne by the PE in Malaysia, **condition 3 is not satisfied**.

**Observation**

In determining whether condition 3 is satisfied or not, various factors in the following scenarios should be considered –

Scenario	Factors
1	If Patrick did not receive any allowance from the branch office in Malaysia and his remuneration, which is solely borne by his employer in the UK, is charged as an expense in the accounts of the employer in UK, <b>condition 3 is satisfied</b> as the remuneration/allowance is not borne by the PE in Malaysia.
2	If Patrick’s remuneration and allowance are borne wholly by the branch office in Malaysia and this remuneration is charged as an expense in the accounts of the PE in Malaysia, <b>condition 3 is therefore not satisfied</b> as the remuneration/allowance is borne by the PE in Malaysia.
3	If Patrick’s monthly remuneration is borne and charged as an expense in the accounts of the employer in the UK and the allowances paid by the branch office in Malaysia is borne and charged as an expense by the PE in Malaysia, <b>condition 3 is not satisfied</b> .  Patrick will be subject to tax in Malaysia on the income attributable to his employment in Malaysia (which includes the remuneration paid by the UK employer and the allowances borne by the PE in Malaysia).

INLAND REVENUE BOARD MALAYSIA

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6. Claim For Tax Exemption By A Foreign National From A Treaty Country

6.1 Tax treaty relief is not automatic

Tax treaty relief is not automatically given. A claim for tax treaty relief can be made at the time of submission of the Income Tax Return Form. Under the self assessment system, when an audit is conducted, it is necessary for foreign nationals claiming a tax treaty relief to prove to the Inland Revenue Board Malaysia that they do indeed qualify for the relief.

6.2 Documentation required

Among the supporting documents required -

- a) Certificate of Residence from the tax authority of the other country overseas to prove the residence status of non-resident foreign nationals for each year concerned.
- b) Certified true copy of the foreign national's passport and a listing of the entry and exit dates to / from Malaysia to determine the number of days of physical presence in Malaysia.
- c) Written confirmation from the employer in the other country overseas regarding:-
  - i) Who bears the remuneration of the foreign national

Whether the remuneration of the foreign national exercising his employment in Malaysia is borne by the:-

- employer in the other country overseas; or
- company resident in Malaysia; or
- PE in Malaysia.

- ii) Reimbursement of cost of remuneration

If the remuneration is paid by the employer in the other country overseas, is the cost of the remuneration is reimbursed by the company resident in Malaysia or the PE in Malaysia (whichever is applicable).

(Please refer to Appendix 1 for a specimen copy of the letter of confirmation)

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d) Written confirmation from the company resident in Malaysia or the PE in Malaysia regarding:-

i) Who bears the remuneration of the foreign national

Whether the remuneration of the foreign national exercising his employment in Malaysia is borne by the:-

- employer in the other country overseas; or
- company resident in Malaysia; or
- PE in Malaysia.

ii) Reimbursement of cost of remuneration

If the remuneration is paid by the employer in the other country overseas, is the cost of the remuneration is reimbursed by the company resident in Malaysia or the PE in Malaysia (whichever is applicable).

(Please refer to Appendix 2 for a specimen copy of the letter of confirmation)

**Director General of Inland Revenue,  
Inland Revenue Board Malaysia.**



APPENDIX 1

**SPECIMEN COPY OF LETTER FROM THE EMPLOYER IN THE COUNTRY OVERSEAS**

Income Tax File No. In Malaysia:-

**Chief Executive Officer/Director General  
Cawangan.....  
.....  
.....**

Dear Sir,

..... (Name of Foreign National & Passport No.)

I refer to the above named employee of .....**(NAME OF COMPANY IN COUNTRY OVERSEAS)** who has been seconded to ..... **(NAME OF COMPANY IN MALAYSIA)** from ..... **(STATE THE PERIOD)**.

This is to confirm that the remuneration of ..... **(NAME OF THE FOREIGN NATIONAL)** is borne by ..... **(NAME OF COMPANY\*)** and not borne by ..... **((NAME OF COMPANY\*)**.

The cost of the remuneration is not reimbursed by the ..... **(NAME OF COMPANY\*)** to ..... **(NAME OF COMPANY\*)**.

\* NAME OF COMPANY - state the name of the company in the country overseas or company resident in Malaysia or PE in Malaysia, whichever is applicable.



APPENDIX 2

SPECIMEN COPY OF LETTER FROM THE DEEMED EMPLOYER IN MALAYSIA

Income Tax File No. In Malaysia:-

Chief Executive Officer/Director General  
Cawangan.....

.....  
.....

Dear Sir,

..... (Name of Foreign National & Passport No.)

I refer to the above named employee of ..... (NAME OF COMPANY IN THE OTHER COUNTRY) who has been seconded to ..... (NAME OF COMPANY IN MALAYSIA) from ..... (STATE THE PERIOD).

This is to confirm that the remuneration of ..... (NAME OF FOREIGN NATIONAL) is borne by ..... (NAME OF COMPANY\*) and not borne by ..... (NAME OF COMPANY\*).

The cost of the remuneration is reimbursed by ..... (NAME OF COMPANY\*) to ..... (NAME OF COMPANY\*).

\* NAME OF COMPANY - state the name of the company in the country overseas or company resident in Malaysia or PE in Malaysia, whichever is applicable.