MAKLUM BALAS
BAHAGIAN KETETAPAN, JABATAN DASAR PERCUKAIAN

Ketetapan Umum Bil. 1/2014 (KU) : Withholding Tax on Special Classes of Income

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1	**<u>Regrossing of payment where withholding tax is borne by the payer</u>** Paragraph 14.1 states that "where withholding tax on payments made to non-resident persons are paid and borne by the payer, that payment is considered net of tax. In such situations, the payment that is received by the non-resident has to be regrossed to determine the amount of income on which income tax should be charged. The withholding tax should be computed on the regrossed income." **CTIM's comments** The above treatment is not in line with the Special Commissioners and High Court decisions in the Esso Production Malaysia Inc ("EPMI") v Ketua Pengarah Hasil Dalam Negeri where it was decided that "there is no basis or provision (in the Petroleum Income Tax Act) for grossing up". The court ordered that the Inland Revenue Board refund the excess withholding tax (due to regrossing) to the taxpayer. We seek IRB's explanation on the basis for deviating from the Court's	14.1	1	**Intention of Parliment** The introduction of Section 4A & 109B is to tax the non-resident (NR) person providing services in Malaysia. When a payer in Malaysia is liable to make a payment to a NR, withholding tax (WHT) has to be deducted. When WHT is not deducted and the NR's tax is borne by the payer, this means that Parliment has acted in vain. **The computation on the regrossed actual sum paid to the NR is a mechanism to ascertain amount of WHT in the event WHT has not been deducted. The NR person should actually receive net amount after payment of WHT (rightly the Malaysian tax) by the payer.** EPMI v KPHDN was a a case involving tax planning where the sole intention of the parties involved was to pay the overseas affiliates in full without any deduction

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	decision in the EPMI case. Examples 15 and 25 of the Public Ruling (reproduced below) cover 2 situations where withholding tax is borne by the Malaysian payer. However we note that the payment involved in Example 15 (disbursements or out-of-pocket expenses) was regrossed to determine the amount of withholding tax to be paid, while in Example 25, withholding tax was computed on the technical service fee paid to the non-resident without regrossing. We would appreciate if IRB could clarify its position on this issue.			of WHT. To achieve this aim, regrossing was carried out to ensure that the NR received the full payment and at the same time payer reduced his tax liability by claiming the WHT paid as an expense. The Court had cited that there is no specific provision to allow **the payment made to the NR to be regrossed.** The court decided that the WHT deducted from the regrossed sum was not an expense wholly and exclusively incurred in the production of income. The facts of the case are considered peculiar to itself and not to be taken as a precedent case.
2	**Due date of withholding tax payment** Example 36 Maxwell Malaysia Bhd in Kuala Lumpur paid technical fees of RM150,000 to Sconil Co. Ltd on 28.2.2013 for services performed in Malaysia. Maxwell Malaysia Bhd has to remit withholding tax deducted of RM15,000 to the DGIR within one month from the date technical fees was paid to Sconil Co. Ltd, which is 30.3.2013 (Saturday). As the due date for payment (30.3.2013) falls on a Saturday, a weekly holiday in Kuala Lumpur, the next working day, Monday (1.4.2013) is therefore the due date for payment.	19	2	The error will be rectified.

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	CTIM's comments Section 109B provides that the payer "*shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the DGIR*": However, Example 36 illustrates that withholding tax is due within 30 days from date of payment. CTIM would like to seek confirmation from the IRB that "*one month after paying or crediting such payment"* will be regarded by the IRB as equivalent to "30 days *after paying or crediting such payment"*. If it is affirmative, to enhance clarity and compliance, we would suggest that the following statement be inserted at the beginning of Paragraph 19: "The law requires the payer, within one month after paying or crediting such payment to the non-resident, render an account and pay the amount of the withholding tax to the DGIR. For the purpose of tax compliance, the IRB's practice is to regard "one month" as 30 days."			
3	**Services that generate income falling within the scope of paragraph 4A(ii)** Para 8.5(f) Services pertaining to the entertainment industry that does not fall within the scope of a public entertainer	8.5(f)	3	The tax provisions will be reviewed to make clear the intention of taxing such category of NR person

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	CTIM's comments S.4A(ii) provides that **"***amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme," "which is derived from Malaysia is chargeable to tax".* S.109B (1)(b) further provides that *"where any person .... is liable to make payments to a non-resident" "for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme" "which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General."….* It is clear that for withholding tax on S.109B to apply, all the following conditions must be satisfied: (a) amount was paid in consideration of technical advice, assistance and services (b) rendered *in connection with technical management or administration* (c) of any scientific, industrial or commercial			

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	undertaking, venture, project or scheme. The kind of payment described in example 12 does not satisfy all the above conditions. The assistance or service rendered by the model cannot be said to be in connection with technical management or administration. Thus, we believe that para 8.5(f) and example 12 is incorrect and should be removed to prevent confusion.			
4	**Basis for revised assessment** **CTIM's comments** The above would require an amended tax return to be filed by the taxpayer upon payment of the withholding tax and increased amount. However there is no provision in the ITA which allows for such revised tax returns to be made as there is technically no "error or mistake" made by the taxpayer in the original tax return filed. We understand from the recent dialogue between the professional tax and accounting bodies and IRB held on 17 February 2014 that IRB adopts a wide interpretation of the scope of "error or mistake" under Section 131. We would appreciate if IRB can confirm that the above revised tax return to claim a tax deduction for the payment subjected to withholding tax can be submitted under Section 131 and insert the understanding in this Paragraph.	16.3	4	To be addressed in PR.

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5	**Disallowance under subsection 39(3)** Para 16.5 states that "However, deductions disallowed under paragraphs 39(1)(f), 39(1)(i) or 39(1)(j) of the ITA 1967 are still applicable to the payers who enjoy tax exemption on income equal to capital expenditure incurred or payers who have no chargeable income (incurred loss)". **CTIM's comments** The above statement is based on section 39(3) except for "payers who have no chargeable income" which is not included in section 39(3). Section 39(3) provides:- "Paragraphs 1(f), … shall not apply if for a year of assessment a person is exempt under paragraph 129(3)(b) or subsection 127(3A) or the Promotion of Investments Act 1986, in respect of all income of that person from all sources **not being exemption on income equal to capital expenditure incurred**." We note that in Example 33, the taxpayer enjoyed investment tax allowance (which is "an exemption on income equal to capital expenditure incurred") but claimed a deduction for the technical fees. This is not in accordance with the above statement and section 39(3). We would appreciate if the example is amended accordingly.	16.5	5	Your observation is noted.

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6	**Examination of transactions** Paragraph 18 provides that the "DGIR reserves the right to examine the position of a transaction more closely where circumstances so require. We would like to seek the clarification of the IRB on what is the purpose for the insertion of this statement. This is the first time such clause is being inserted in a public ruling. The statement reduces the certainty and makes it difficult for the taxpayers to rely on the Public Ruling and thus reduces the confidences of the taxpayers over the interpretations and treatment indicated as well as concessions offered in the public rulings. We are of the view the Public Ruling should take a definitive and clear stand to eliminate uncertainty. Where situation arises where the IRB recognized there needs to be a change, then an amendment to PR could be issued and take effect from the date of issue. In this way the law and practice will developed in a more dynamic and transparent manner.	18	6	This statement is found in paragraph 16 of PR4/2005 (12.9.2005). This paragraph merely highlights that all transactions are subject to audit, when necessary.
7	**Effective date** Public ruling issued prior to Public Ruling No.2/2012 had a paragraph stipulating the effective date for the public ruling. The subsequent public rulings issued had been silent on the effective dates. At present, it is stated in the IRB's website that *"The*		7	Comment 7(i) is noted. Comment 7(ii) & (iii) There is only one interpretaion at the time the law was introduced. Taxpayers have always communicated with IRB regarding the interpretation

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	effective date of each relevant paragraph in a Public Ruling follows the effective date of the related provisions in the Income Tax Act 1967, Income Tax Exemption Income Orders or Income Tax Rules. Where a concession is given, the effective date or period of the concession would be mentioned in the respective paragraph where necessary." CTIM is of the view that (i) As the notification on the website is temporary by nature (as it can be removed, amended without leaving any trace), it is recommended that the clause regarding effective date is incorporated into the public ruling itself. (ii) The manner of determining effective date results in retrospective application of the law and creates uncertainty. (iii)It is unclear as to what would be the consequences of an interpretation in a public ruling being different from the taxpayer's interpretation of the law at the time when the public ruling was not yet available. Where the interpretation in the public ruling results in a lower chargeable gain, would the taxpayer be denied the benefits of the public ruling pursuant to section 131(4) of the Act? An appropriate channel of communication to taxpayers on the issuance of new or revised public rulings is			of the law where no PR is available. PR is issued to explain the interpretation and application of the tax laws. There should not exist different effective dates for the application of the tax laws. All PR issued are made known to all the relevant tax institutes/associations at the time the PR is uploaded to IRB's website. The respective parties should take the initiatives to inform their members.

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	critical to ensure that taxpayers are kept informed on new and revised public rulings.			
8.	**Late payment penalty** **Example 31** The facts are the same as in Example 29 except that in the agreement between Tokoh Sdn Bhd and Powerplant Pte Ltd, there was a clause stating that Tokoh Sdn Bhd would be charged late payment interest of 5% on any unpaid amount if it fails to make the payment due to Powerplant Pte Ltd by 30.8.2012. Tokoh Sdn Bhd paid Powerplant Pte Ltd RM1,050,000 (amount due of RM1,000,000 + 5% late payment interest of RM50,000) on 30.12.2012. Tokoh Sdn Bhd did not deduct and remit the withholding tax due and payable. The total technical service expenses of RM1,000,000 will be disallowed as a deduction for tax purposes for the relevant year of assessment pursuant to paragraph 39(1)(*j*) of the ITA 1967. The 5% late interest payment of RM50,000 payable to Powerplant Pte Ltd by Tokoh Sdn Bhd is not an allowable deduction under paragraph 39(1)(*b*) of the ITA 1967. **CTIM Comments:** The Institute is of the view that the late payment penalty should be allowed as a tax deduction.	16.4	8	Penalties are not incurred wholly and exclusively in the production of income.

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9	**Grace period for remittance of withholding tax to the IRB** Paragraph 19 states that "If the last day of the period for remitting payment is a weekly holiday or a public holiday in Malaysia, the period will include the next working day. In other words, if the due date for payment of withholding tax falls on a weekly holiday (e.g. Saturday and Sunday in Kuala Lumpur and Saturday in Terengganu) or a public holiday in Malaysia, the following working day would be considered as the due date for payment." **CTIM Comments:** Would the determination of the extended due date (taking into consideration the grace period) be based on the state where the business of the tax payer is or the tax agent or where the tax file is registered?	19	9	The determination of the extended date should be based on the state where the tax file is registered.