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Aspects of tax administration in Malaysia

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PART 1

Relevant to P6 (MYS)

This two-part article is relevant to candidates preparing for the P6 (MYS), Advanced Taxation exam. The article is based on the prevailing laws as at 31 March 2017. Candidates are presumed to have a working knowledge of the subject matter.

This article collates and discusses the provisions in the Income Tax Act 1967 (the Act) and the Real Property Gains Tax Act 1976 (RPGTA) relating to tax administration. While reading this article, candidates are expected to refer where necessary to the relevant provisions of the Act and RPGTA, as amended, and the relevant public rulings issued by the Inland Revenue Board.

This article is relevant to the section of the syllabus and study guide falling under items A7(b), B5 and B8. The areas covered are:

Part 1

A. Responsibilities as a taxpayer

B. Responsibilities as an employer

C. Rights of a taxpayer

Part 2

D. Powers of the director general (DG)

E. Liabilities of a director

F. Responsibilities as a payer/acquirer

G. Statutory time bar

H. Advance/private rulings

I. Tax audit and investigation

A. Responsibilities as a taxpayer

Notification of chargeability

Where an individual arrives in Malaysia in a calendar year, and is chargeable to tax in Malaysia for that particular year or for the following year, they should notify the Director General (DG) that they will be so chargeable within two months of their arrival. Note that the responsibility to notify is applicable regardless of whether the individual is likely to be a tax resident or non-tax resident. The responsibility applies as long as the individual derives income subject to tax in Malaysia.

Furnish tax returns

Individuals

For each year of assessment, every individual who has chargeable income for that year and/or the year before, shall furnish a tax return in the prescribed form (Form B, or BE) for that year of assessment

- by 30 June of the following year if he carries on a business, or
- by 30 April of the following year if he derives income from other non-business sources of income.

Companies, LLP, and trusts

These entities shall furnish the annual tax return within seven months of the close of the accounting period which constitutes the basis period for the year of assessment.

A company is required by law to file its annual return by electronic medium or by way of electronic transmission.

The annual tax return by a company must be based on accounts audited by a professional accountant. This is significant as if the return is not based on audited accounts, but on, say, management accounts, the said return is an incorrect return. It is therefore imperative that the annual statutory accounts be ready in good time for the tax return to be submitted within seven months of the close of accounts.

Notify any change of address

Every person chargeable to tax in Malaysia is required to notify the DG of any change of address within three months of the change. The notification must be made in writing.

Duty to keep sufficient business records

A person carrying on a business is obliged to keep and retain sufficient business records in Malaysia for seven years after the end of the relevant year. Where the person is late in furnishing the annual tax return, the records must be retained for seven years after the end of year in which the return is furnished.

Where the gross annual business takings exceed RM150,000, the person must issue printed receipts serially numbered for every sum received from his business activity.

For persons who do not carry on a business but who are required to furnish a tax return, records must be retained for seven years from the end of the relevant year or seven years after the end of the year in which the return is furnished.

Pay tax on time by instalments or monthly tax deductions (MTD)

Generally, tax is payable when an assessment is raised, but taxpayers are given 30 days to settle the tax. If tax is paid beyond the 30 days, a late payment penalty of 10% is levied , and if payment is made beyond the next 60 days, there is an additional 5% penalty levied.

Individuals

For an individual, employment income is subject to MTD from monthly emoluments. For individuals who derive income other than employment income, the DG may estimate their tax payable based on the preceding year's tax payable and require them to pay the estimated tax in instalments at prescribed due dates. If the estimated tax instalments are not paid within 30 days of the due date, a penalty of 10% of the amount unpaid or paid late is levied.

Any balance of tax payable when the actual self-assessed tax is determined is payable on the due date (ie by 30 April or 30 June of the following year), failing which a 10% penalty of the amount unpaid or paid late is levied.

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Companies, LLPs and trusts

For companies, LLPs and trusts, there is a requirement to furnish a tax estimate to the DG not later than 30 days before the beginning of the basis period for that year of assessment. The tax estimate may not be less than 85% of the tax payable for the immediately preceding year of assessment. The tax estimated will be payable in 12 equal instalments starting from the second month of the basis period. The payment of the tax instalment must be made by the 15th day of the calendar month.

The tax estimate may be revised, upwards or downwards, in the sixth and ninth months of the basis period. The taxpayer is not required to provide any grounds or reasons for the revision. Thereafter, the amount of the remaining tax instalments will be adjusted accordingly.

It is important to note that if the tax liability for the relevant year of assessment exceeds the tax estimate or revised tax estimate by more than 30%, there will be a 10% penalty levied on the amount in excess of the 30% buffer.

For a newly commenced company, LLP or trust, if the first basis period is at least six months long, the first estimate of tax must be furnished within three months from the date of commencement of operations. The tax thus estimated will be payable in equal instalments over the number of months in the basis period, the first instalment being in the 6th month.

Illustration 1

NewCo Sdn Bhd (NewCo) commenced operations on 1 April 2017 and closed its first set of accounts on 31 December 2017.

The first basis period comprises nine months (1 April 2017 to 31 December 2017) for YA 2017. NewCo will need to furnish an estimate of tax for YA 2017 within three months – ie by 30 June 2017, and pay nine equal tax instalments for the months of September 2017 (sixth month) through to July 2018.

For YA 2018, NewCo will have to furnish a tax estimate by 30 November 2017, and pay its 12 tax instalments for YA 2018 by the 15th day of each of the months of February 2018 through to January 2019.

For a newly-commenced company which is a small and medium enterprise (SME), the requirement to provide an estimate of tax is waived in respect of the first year of assessment with a basis period and the immediately following year of assessment.

An SME is a company which is resident and incorporated in Malaysia, and which, as at the beginning of the basis periods for the aforementioned first two years of assessment, has a paid up ordinary share capital of RM2.5 million or less.

A company does not qualify as an SME if either its holding company, its subsidiary, or a fellow group company, has paid up ordinary share capital of more than RM2.5 million as at the beginning of the relevant basis period for a year of assessment.

Illustration 2

The facts are as in Illustration 1, except that NewCo fulfils the requirements of an SME at both 1 April 2017 and 1 January 2018.

NewCo will not be required to furnish a tax estimate for YA 2017 and YA 2018. The first year of assessment NewCo will furnish a tax estimate for is YA 2019 (basis period 1 January 2019 to 31 December 2019). The due date for furnishing the tax estimate is 30 November 2018.

The proper management of the tax payment scheme is significant for a company, LLP or trust, as it directly impacts the cash flow situation of the business and non-compliance or late compliance can result in punitive penalties. The occurrence of sudden or large increases or decreases in gross income, regardless of the reason, or any change in the paid up ordinary share capital should trigger consideration of any knock-on effect on the requirement or reliability of the tax estimate.

Furnish information when required by the DG

Every person is obliged to provide information called for by the DG within the time stipulated.

If the information is not provided within the specified time or extended time, and the information relates wholly or partly to a deduction claimed, the DG may disallow such deduction under s39.

Notify the date of death of a taxpayer

S74(3) of the Act and s14(4) of RPGTA set a three-year time limit for the DG to issue assessments on the income derived by a deceased person. The three-year period commences after the end of the year of assessment in which the DG is informed in writing by the executor of the death of the individual.

Hence, the executor should notify the date of death of the deceased person as soon as possible in order to restrict the three-year time limit, as illustrated below:

Illustration 3

Mr AB died on 1 December 2014 and Mr XY is the executor. Mr XY notified the DG regarding the death of Mr AB on 29 December 2014.

The DG has three years from the end of 2014 – ie until 31 December 2017 to raise any assessment or additional assessment on Mr AB for YA 2014 and/or prior years.

If Mr XY had notified the DG on 1 July 2017, the DG would have had three years from the end of 2017 – ie until 31 December 2020 to raise an assessment or additional assessment on Mr AB for YA 2014 and/or prior years.

B. Responsibilities as an employer

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Employers must:

- deduct the MTD from the remuneration of each of their employees in accordance with the schedule on account of tax
- furnish an employer's return, by 31 March following the end of the relevant year, containing all of the required information
- prepare the annual statement of remuneration and make it available to their employees by the end of February following the end of the relevant year
- notify the DG within one month before an employee leaving Malaysia for more than three months, or retain any moneys due to a departing employee (under specified circumstances) for 90 days and then pay this retained money over to the DG, if so directed, towards payment of the employee's tax payable.

C. Rights of a taxpayer

Right of appeal

The general requirements of a valid appeal are

- timeliness – submitted within 30 days of the issue of a notice of an assessment)
- proper form – (the appeal must be made in writing using the appropriate form (Form Q), and
- substance – the grounds for making an appeal must be stated..

Extension of time for appeal

With respect to timeliness, if a taxpayer is late in appealing, they may apply for an extension of time through a prescribed form (Form N) to the DG stating their reasonable cause. If the DG is satisfied, they will grant the extension. Otherwise, they will forward the application for consideration by the Special Commissioners of Income Tax (SCIT), a single commissioner, to decide, stating their reasons for dissatisfaction. The SCIT's decision to grant or refuse the application is final.

Time limits

The DG has to comply with a time limit in processing the appeal of 12 months (plus extension of six months if the IRB applies before 12 months lapse) to review the appeal and transmit the case to the SCIT.. Case law has established that if the DG fails to process the appeal within the time limit, the DG may be deemed to have agreed to the grounds of objection and effectively agreed to the appeal by the taxpayer.

Restriction to the right of appeal

With effect from 31 December 2014, the appeal provisions have been amended to restrict the right of appeal in respect of self-assessed original or additional assessments.

Effectively, a person cannot appeal against their own assessment or their own additional assessment unless he is 'aggrieved by the public rulings issued by the DG or he is aggrieved by any practice of the DG generally prevailing at the time when the assessment is made'.

Illustration 4

Company JK furnished a tax return for YA 2017 on 31 August 2017. The deemed assessment (under the self-assessment regime) is, among other things, based on the treatment of entertainment expenses in the Public Ruling 2015/4.

Company JK does not agree with the treatment, but accepted the treatment as stipulated in the Public Ruling mainly because it wanted to avoid any penalty for an incorrect return.

Company JK will be able to appeal against the assessment with regard to the treatment of the entertainment expense.

Illustration 5

Company EF furnished a tax return for YA 2017 on 31 August 2017. In the deemed assessment (under the self-assessment regime), Company EF has treated a substantial compensation receipt as taxable income, despite its view that it was capital in nature, to avoid any penalty. There is no position taken by the DG in any public ruling issued thus far, and there is no general prevailing practice by the DG in this matter.

Company EF wishes to appeal against its own self-assessed assessment for YA 2017 with regard to the taxation of the compensation receipt.

Pursuant to s99(4), the right of appeal is not available to Company EF.

Note: It appears to the writer that Company EF should take a position that the compensation receipt is capital in nature, therefore not subject to tax. If, in future, the DG conducts a tax audit, discovers this treatment, but determines that the compensation receipt is revenue in nature, they could subject the receipt to tax and impose a penalty. Company EF will then be able to appeal against the DG's additional assessment.

No right of appeal

There is no right of appeal with regard to the following assessments:

- composite assessment: because such an assessment is made after an agreement has been reached between the DG and the taxpayer
- increased assessment: because this is an assessment raised to give effect to a decision by the courts.

Error and mistake relief

The required conditions are:

- the person has paid tax
- the person alleges that the assessment is excessive by reason of an error or mistake made by them
- the assessment has not become final and conclusive (Note: IRB's practice is to accept that no valid appeal does not automatically mean final and conclusive)
- the person applies for relief within five years of the end of the year of assessment within which the assessment was made

The application procedure for error and mistake relief is similar to an appeal, as is the processing by the DG except that the time limits differ slightly.

Note that there is no provision for extension of the time limits like there is in respect of appeals.

Alternatives to error and mistake relief

With effect from 1 January 2017, there is a new provision, s131A, which provides relief for amendment of an assessment due to retrospective approval of an exemption, relief, remission, allowance or deduction, etc. granted after the filing of tax return. Another opportunity for amendment concerns the retrospective deductibility of payments to non-residents after a late compliance with withholding tax provisions.

As this is recent legislation, candidates are encouraged to read in detail and analyse the provisions of s131A to obtain a proper appreciation of its application.

Part two of this article will deal with other aspects of tax administration.

Written by a member of the P6 (MYS) examining team

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