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Highlights Of The Finance Bill 2020

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
+6019 997 3918
naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
+6019 269 5229
sara@rdslawpartners.com

On 16.11.2020, the Finance Bill 2020 (**Bill**) was tabled. The Bill proposes various amendments to the current key revenue legislations such as the Income Tax Act 1967 (**"ITA"**), Real Property Gains Tax Act 1976 (**RPGTA**), Stamp Act 1949 (**SA**), Petroleum (Income Tax) Act 1967 (**PITA**) and Labuan Business Activity Tax Act 1990 (**LBATA**). The effective date of the proposed amendments varies.

In this alert, our Tax, SST & Customs practice has summarised the key features of the Bill.

A. Income Tax Act 1967

Tax Rebate for Small and Medium Enterprise

Clause 6 of the Bill seeks to introduce a new Section 6D to the ITA. Tax rebates may be granted to companies or limited liability partnerships for a period of 3 consecutive years from the year of assessment (**YA**) in which a company or limited liability partnership first commences operation, in an amount equivalent to its operating or capital expenditure incurred up to a maximum limit of RM20,000 for each year of assessment.

However, there are certain conditions to be met in order to qualify for the tax rebate under the proposed Section 6D, among others:

(a) The company or limited liability partnership must be a tax resident and incorporated in Malaysia;

(b) The paid-up or capital contribution must not be more than RM2.5 million, and its gross business income must not exceed RM50 million; and

(c) The company or limited liability partnership must commence operation on or after 1.7.2020 but not later than 31.12.2021.

This new provision is aimed at facilitating economic growth in light of the current Covid-19 pandemic and to further strengthen the nation's economic position by encouraging the establishment of small and medium enterprises.

Group Relief – Determination of Related Companies

Subject to Section 44A of the ITA, a surrendering company may, for the basis period for 3 consecutive years of assessment, surrender not more than 70% of its adjusted loss in the basis period of a year of assessment to one or more related claimant company.

For the purposes of determination of related companies, Section 44A(3) provides that surrendering and claimant companies are deemed to be related if:

(a) at least 70% of the paid-up ordinary share capital of the surrendering company is owned directly or indirectly by the claimant company;

(b) at least 70% of the paid-up ordinary share capital of the claimant company is owned directly or indirectly by the surrendering company; or

(c) at least 70% of the paid-up ordinary share capital of the surrendering company and claimant company is owned directly or indirectly by another company resident and incorporated in Malaysia.

However, Clause 12 of the Bill seeks to amend Section 44A(3)(c) by inserting after the word "indirectly" the words "(through the medium of other companies resident and incorporated in Malaysia)". In this regard, companies indirectly holding the surrendering or claimant company must be a resident and incorporated in Malaysia.

It is notable that the amendment seeks to impose a narrow interpretation upon the wordings of "indirect ownership" in the determination related companies. Should this amendment be approved, taxpayers must be mindful in claiming for group relief and ensure that all related companies, whether owned directly or indirectly, are resident of and incorporated in Malaysia.

Approved Incentive Scheme

Clause 16 of the Bill seeks to insert a new Section 65B when read together with the proposed Section 6(1)(m) and Section 6(1)(n), aims to introduce a new incentive scheme for the following persons who carries out a qualifying activity under the incentive scheme approved by the Minister of Finance:

(a) persons who carries on business in respect of the qualifying activity; or

(b) residents who are employed in a company which carries out the qualifying activity.

The term "qualifying activity" is widely defined and includes any high technology activity in manufacturing and services sector and any other activities which would benefit the economy of Malaysia.

The chargeable income of the person derived from the qualifying activity shall be subjected to income tax at a rate of not more than 20%. This tax rate is prescribed by the Minister of Finance under the proposed amendment to Part XVIII, Schedule 1 of the ITA.

The proposed Section 65B(2) stipulates that the chargeable income of the qualifying activity is equal to the statutory income minus any unabsorbed losses brought forward from prior years. Any unabsorbed losses from the qualifying activity at the end of this scheme can be carried forward for 7 years. However, any unabsorbed losses from the qualifying activity can only be offset against the income derived from the qualifying activity. Such losses are not deductible against any income derived from a non-qualifying activity.

This is because under the proposed incentive scheme, the business in relation to qualifying activity shall be treated as a separate and distinct business and source of such person. Thus, a person who carries on a business in respect of a qualifying activity shall maintain a separate account for the administration of income derived from such qualifying activity.

Eligible taxpayers should be mindful of these underlying conditions imposed when claiming a deduction under this incentive scheme as the Director General of Inland Revenue (**DGIR**) may, within 5 years after the expiration of the tax incentive period, raise additional assessments in the event of non-compliance in counteracting any benefit obtained under this scheme.

Notice for the Commencement and Cessation of Employment

Clause 18 of the Bill seeks to amend Section 83 of the ITA whereby it is proposed that the employer must now give notice in the prescribed form to the DGIR pertaining to the commencement or cessation of the employment of an individual who is or is likely to be chargeable to tax in respect of income in respect of gains or profits from the employment. Furthermore, notice in the prescribed form must be given to the DGIR in circumstances where an individual under his employment dies.

In addition, the proposed amendments also seek to amend the prescribed time period to 30 days instead of one month. Therefore, the employer must give notice in the prescribed form in accordance with the following prescribed time period:

(a) Not later than 30 days from the commencement of employment;

(b) Not less than 30 days before the cessation of employment; or

(c) Not more than 30 days after being informed of the death of the individual.

Similarly, the amendment which requires employer to give notice to the DGIR in the prescribed form as opposed to a written notice also applies to the provisos in Section 83(3) and Section 83(4) accordingly. The prescribed period of one month is also amended to 30 days for the said provisions.

The proposed amendments impose a further requirement of the notice to be given in a prescribed form to the DGIR. This would follow the interpretation of “prescribed form” in Section 2 of the ITA. Further, the amendment of the prescribed time

period to 30 days provides better clarity compared to the present stipulation of one month. Albeit there is no substantial change to the length or duration of the time period for compliance, it is now more definitive and less obscure which will enable fluent compliance with the relevant rules. The proposed amendments do not seem to pose any undue difficulties or issues and the greater clarity in the prescribed time period is welcomed.

No Relief of Taxes, Debt or Any Other Sum in Tax Proceedings

Clause 20 of the Bill proposes to insert Section 103B to the ITA. It states that a person shall not be relieved from taxes, debt, or any other sum, for which he is liable to pay, when proceedings have been initiated against the Government or the DGIR.

The effect of the proposed Section 103B may raise concerns on whether it would affect the granting of stay orders by the Courts. If a person is unable to seek and rely on a stay order, he would be burdened with settling the assessments raised by the DGIR pending the full and final determination of the correctness of the assessment.

However, we view that the proposed Section 103B would not carry such an effect as to interfere with the court's inherent jurisdiction to grant a stay order.

Travel Restrictions under Section 104 of the ITA

Clause 21 of the Bill proposes amendments to Section 104 of the ITA 1967, which governs the instances where the DGIR may exercise its powers to prevent a person from leaving Malaysia.

The insertion of Section 140(1A) is to provide that the certificate issued by the DGIR containing particulars of the person's tax liability and a request for the person to be prevented from leaving the country until he pays all tax, may be done through an electronic medium or by electronic transmission.

Failure to Furnish Contemporaneous Transfer Pricing Documentation

Clause 24 of the Bill seeks to introduce a new provision, Section 113B to the ITA. It stipulates that any person who defaults in furnishing contemporaneous transfer pricing documentation in respect of any YA in accordance with any rules made by the Minister of Finance to implement and facilitate the operations of Section 140A, shall be guilty of an offence. Section 140A of the ITA currently governs transactions between related companies and ensures that all transactions are at arm's length.

On conviction, the person will be liable to a fine not less than RM 20,000 and not more than RM 100,000 or to imprisonment for a term not exceeding 6 months or to both.

The onus is on the accused to prove that the contemporaneous transfer pricing documentation has been furnished. However, the court has the discretion to make a further order against the person convicted of the offence to comply with the relevant provisions of the rules under which the offence has been committed within 30 days, or such period as the court deems fit, from the date the order is made. Where no prosecution has been instituted for the default, the DGIR may by notice in writing or in the notice of assessment require that person to pay a penalty of not less than RM20,000 and not more than RM100,000.

If that person pays that penalty, or where the penalty is abated or remitted under Section 124(3), so much, if any, of the penalty as has not been abated or remitted, he shall not be liable to be charged on the same facts with an offence. The person served with the said notice may appeal to the Special Commissioners of Income Tax (**SCIT**) within 30 days as if the notice was a notice of assessment subject to the provisions of this Act relating to appeals, with any necessary modifications.

The introduction of the new Section 113B creates a new offence which requires taxpayers to be cautious with the provision of contemporaneous documentations required by the rules and relevant provisions in the ITA.

The introduction of this new offence also places the burden of proof on the accused as opposed to the prosecution which is conventionally the bearer of the burden of proof in criminal proceedings.

Section 113A of the ITA includes a provision that relieves the taxpayer from liability if he had acted in good faith despite the failure to provide the necessary documentations in compliance with the relevant rules. However, unlike Section 113A, the new Section 113B do not provide similar provisions to relieve the taxpayer from a mistake made in good faith. Instead, the accused is only given the option to appeal to the SCIT to obtain relief from committing the offence.

DGIR's Power to Substitute the Price, Disregard Structure and Impose Surcharge in Controlled Transactions

Clause 26 of the Bill seeks to amend Section 140A by inserting the following subsections:

> *"(3A) The Director General may disregard any structure adopted by a person in entering into a controlled transaction if –*
>
> *(a) the economic substance of that transaction differs from its form; or*
>
> *(b) 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 by independent persons behaving in a commercially rational manner and the actual structure impedes the Director General from determining an appropriate transfer price.*
>
> *(3B) Where the Director General disregards any structure adopted by a person entering into a transaction under subsection (3A), the Director General shall make adjustments to the structure of that transaction as he thinks fit to reflect the structure that would have been*

adopted by an independent person dealing at arm's length having regard to the economic and commercial reality.

(3C) Where this section and any rules made under paragraph 154(1)(ed) apply, the Director General may by notice in writing require that person to pay a surcharge of not more than five per cent of the amount of increase of any income generally, or reduction of any deduction or loss, as the case may be, as a consequence of exercising his powers to substitute the price in respect of a transaction entered into by a person to reflect an arm's length price for that transaction or to disregard any structure adopted by a person in entering into a transaction.

(3D) Any surcharge required to be paid by a person under subsection (3c) shall be collected by the Director General as if it were tax payable by that person, but shall not be treated as tax so payable for the purposed of any provision of this Act other than Sections 103 to 106."

The DGIR will be empowered to impose a surcharge of not more than 5% upon any adjustments made regardless whether the adjustments are taxable. This widens the scope of powers afforded by the DGIR in ensuring taxpayers abide by the arm's length principle. Should the Bill be passed, it is foreseeable that allegations of tax avoidance by the DGIR will be commonplace.

Definition of "Plant" in Capital Allowance Claims

Clause 28 of the Bill seeks to further define the meaning of a "plant" for the purposes of claiming capital allowance. A new paragraph 70A is inserted in Schedule 3 of the ITA, which states:

"In this Schedule, "plant" means an apparatus used by a person for carrying on his business but does not include a building, an intangible asset,

or any asset used and that functions as a place within which a business is carried on."

In this regard, the definition of a "plant" is further narrowed to exclude buildings, intangible assets, or any assets integral to a business premise, contrary to established judicial precedents. For instance, a 7 storey carpark building was held to be a plant in the case of ***Tropiland Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2016) MSTC ¶30-129**, a landmark case handled by our Datuk D.P. Naban and Mr S. Saravana Kumar.

Extended Qualifying Period for Reinvestment Allowance

Clause 30 of the Bill seeks to allow companies whose qualifying period ended in the YA 2019 or preceding YA to claim reinvestment allowance for YAs 2020, 2021 and 2022. Companies whose 15 qualifying YAs ends in YA 2020 or 2021 can continue claiming reinvestment allowance until YA 2022.

Prior to the amendments, companies whose 15 qualifying years of assessment ended in YA 2018 could not claim reinvestment allowance for YA 2019. Similarly, companies whose qualifying period ended in YA 2019 or in any following YA would be barred from claiming reinvestment allowance after the expiry of their qualifying period.

The proposed amendments would allow companies whose qualifying period expired in YA 2019 or any preceding YA to claim reinvestment allowance from YAs 2020 until 2022. However, the new amendments would not apply retrospectively, meaning, companies whose qualifying period ended in YA 2018 would still be barred from claiming reinvestment allowance for YA 2019, but these companies can claim reinvestment allowance from YAs 2020 until 2022. This incentive is welcomed in light of the current economic situation and will enable eligible companies to reduce their operational costs by enabling them to continue to claim reinvestment allowance on their assets (i.e. factory, plant or machinery).

B. Real Property Gains Tax Act 1976

Discretion to Waive Additional Taxes Payable by Acquirer

Under Section 21B of the RPGTA, an acquirer of a property has a duty to retain and pay a part of the consideration to the DGIR within 60 days from the date of the disposal of a property. However, if an acquirer fails to do so upon relying on an incorrect or wrong RPGT return, an acquirer would be subjected to an additional 10% of the taxes payable as stipulated in Section 14(5) of the RPGTA.

Clause 32 of the Bill seeks to introduce a new provision to Section 14 of the RPGTA which allows the DGIR to remit the additional taxes payable by the acquirer:

> "*Notwithstanding subsection (5), the Director General may, in his discretion for any good cause shown, remit the whole or any part of the sum referred to in that subsection and, where the sum remitted has been paid, the Director General shall repay the same*."

This new provision gives the DGIR a discretion to waive the 10% additional tax payable by the acquirer if a good cause can be shown. However, it is unclear whether the term "any good cause" is only limited to incorrect or wrong return or other reasonable grounds could warrant an exercise of the DGIR's discretion as well.

No Relief of Taxes from Proceedings Against Government or DGIR

Clause 35 of the Bill seeks to introduce a new provision, Section 21C in RPGTA to clarify that no person will be relieved from the liability to pay tax under the RPGTA notwithstanding the institution of any proceedings under any other written law against the Government or DGIR.

This proposed provision reinforces and strengthens the "pay first talk later" practice. Section 21 of the RPGTA provides that taxes are due and payable within 30 days of the date of an assessment despite the filing of an appeal against the

assessment. This new provision widens the scope as it is applicable to any proceedings under any other written law.

However, as discussed in the proposed amendment in Clause 20 with regard to Section 113B of the ITA above, this proposed provision should not affect the discretion of our courts to stay the effect of an assessment (including its enforcement) in any civil proceedings. This is because the power to grant a stay is part of the inherent jurisdiction of our courts. It would be unconstitutional for Parliament (i.e. legislature) to limit the powers of the Courts (i.e. judiciary).

Tax Agents and Lawyers Authorised to Furnish Returns on Behalf of Chargeable Persons

Clause 37 of the Bill seeks to introduce amendments to Section 57A of the RPGTA, which currently allows forms to be furnished in an electronic medium.

The proposed amendments enable a person to authorise a tax agent or advocate and solicitor to submit any form required under the RPGTA electronically on behalf of the person. The person and the authorised tax agent or advocate and solicitor would need to make a declaration in the form submitted. The hard copy of the form is to be kept by the person giving the authorization for a period of 7 years.

If the amendment is approved, tax agents and lawyers will be able to furnish RPGT returns directly on behalf of a person, which would expediate the process for various transactions.

C. Stamp Act 1949

Expanded Definition of the Term "Duly Stamped"

Clause 40 of the Bill proposes a technical amendment to the definition of "duly stamped" by expanding the definition to include instances where instruments are stamped by means of digital or electronic medium. A key addition to the definition of "duly stamped" is where:

> *"(a) a stamp certificate for the proper amount or the amount of initial duty or the amount*

of advance duty is attached to the instrument if the instrument is stamped through an electronic medium; or

(b) the instrument is stamped by means of digital stamping for the proper amount or the amount of initial duty or the amount of advance duty;"

This amendment would bring the SA in line with digitalisation and technological advancements. Similar amendments are proposed in various provisions throughout the SA to ensure consistency with the new definition.

Stamp Duty Relief

Clause 49 of the Bill proposes to insert a new Section 80B to expand the power of Collector to remit stamp duties paid or payable on grounds of poverty. The section reads:

> *"The duty paid or payable by any person may be remitted wholly or in part on grounds of poverty by the Collector and, where the sum remitted has been paid, the Collector shall repay the same."*

The word "shall" in the second limb of the provision denotes a duty on the part of the Collector to refund the sum paid by any person entitled to the relief of poverty.

This amendment is significant as it widens the scope of the Collector's power to remit stamp duties. Previously, the Collector is only empowered to remit penalties payable under Section 43(6), Section 47A(2) and Section 53(3) of the SA. Although this might be a favourable step in light of the economic repercussions of the Covid-19 pandemic, the scope of application and the Collector's discretion is still open to interpretation. It is unclear what constitutes "poverty" for the purposes of Section 80B or what criteria must be satisfied for a person to qualify for this relief.

D. Petroleum (Income Tax) Act 1967

No Relief of Taxes from Proceedings Against Government or DGIR

Clause 52 of the Bill proposes to introduce a new Section 48A to the PITA to clarify that taxes, debt or other sum a person is liable to pay under PITA shall remain payable notwithstanding the institution of any proceedings under any other written law against the Government or DGIR.

The proposed amendment to this section similar to that of to the ITA, RPGTA and LBATA provided in Clauses 20, 35 and 42 of the Bill. However, this new section should not bar or in any way limit the court's inherent jurisdiction from granting a stay order on any assessments raised under the PITA.

Public Ruling

Clause 54 of the Bill seeks to introduce a new section 71B in PITA which allows the DGIR to make a public ruling on the application of the provisions of PITA. This new section is in *pari materia* with Section 138A of the ITA. Under the new section 71B, the DGIR is able to withdraw a part or the whole of public ruling issued and the DGIR have to apply the provision in relation to a person and related arrangement in according to its public ruling.

Our view is that public rulings do not have the force of law and remain as a guide made by the DGIR. Nevertheless, the DGIR is bound by the public rulings it issued. This is clear from the following proposed Section 71B(3):

> *"(3) Notwithstanding any other provisions of this Act, where a public ruling made under subsection (1) applies to any chargeable person in relation to an arrangement and the chargeable person applies the provision in the manner stated in the ruling, the Director General shall apply the provision in relation to the chargeable person and the arrangement in accordance with the ruling"*

E. Labuan Business Activity Tax Act 1990

Definition of Labuan Entities

Clause 56 of the Bill seeks to provide clarification on the definition of a Labuan entity under Section 2B of the LBATA. Currently, in order for a company to be charged to tax in accordance with the provisions of the LBATA, the company must carry out a Labuan business activity (either trading or non-trading activity). The new Section 2B(1)(b) clarifies that both Labuan trading and non-trading activities need to have adequate number of full-time employees in Labuan and adequate amount of annual operating expenditure in Labuan. Additionally, companies carrying out Labuan non-trading activities have to also comply with any condition in relation to control and management in Labuan.

Pursuant to Section 2B(1A) of the LBATA, any companies which fails to meet the requirements will not be entitled to enjoy the tax rates under LBATA and would be subjected to the tax rate of twenty-four per cent upon its chargeable profits. The term "chargeable profits" is now defined by a new Section 2B(1B) 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*".

Following the amendments made by the Finance Act 2018 and now the proposed amendments, it is clear that the requirements to be a Labuan entity is stricter than before. Companies would need to ascertain whether the conditions under LBATA have been fulfilled, failing which, there is a risk that they will be unknowingly subjected to tax under the ITA instead.

No Relief of Taxes from Proceedings Against Government or DGIR

Clause 60 of the Bill aims to introduce a new provision which states that no institution of any proceedings under any other written law against the Government or the DGIR could relieve any person from the liability for the payment of any tax, debt or any sum payable under the LBATA.

This proposed amendment does not bar or in any way limit the court's inherent jurisdiction from granting a stay order on any assessments raised under the LBATA.

Conclusion

In a nutshell, the amendments proposed under the Bill in respect of the ITA, RPGTA, SA, PITA and LBATA are expected to lead to significant impacts in the current tax landscape in Malaysia. Hence, it is imperative that taxpayers are aware of the proposed amendments under the Bill to better equip themselves should the Bill be passed in the near future. This is especially so that most of the amendments may be in effect in less than 6 weeks from now.

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
+6019 997 3918
naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
+6019 269 5229
sara@rdslawpartners.com

How can we help you?

We are operating as usual and clients may pose any tax queries including those in relation to GST matters via e-mail to:

- **Datuk D.P. Naban**
  Senior Partner

- **Mr S. Saravana Kumar**
  Partner &
  Head of Tax, SST & Customs

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For non-tax queries, please contact:

Rosli Dahlan
Partner
Head of Dispute Resolution
rosli@rdslawpartners.com

Ooi Bee Hong
Partner
Head of Corporate
beehong@rdslawpartners.com

Ong Eu Jin
Partner
Head of Capital Markets and Mergers & Acquisitions
eujin@rdslawpartners.com

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