TAX FLASH

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In this Issue

› Moore Malaysia

› Moore Global

› Inland Revenue Board

Finance (No. 2) Act 2023

The *Finance (No. 2) Act 2023* has been gazetted on 29th December 2023 with no material difference from the Finance (No. 2) Bill 2023.

PR No. 8/2023 – Tax Treatment for a Company that Establishes a Special Purpose Vehicle for the Issuance of *Sukuk* – Section 60I ITA 1967

The IRB has recently issued the *Public Ruling ["PR"] No. 8/2023 – Tax Treatment for a Company that Establishes a Special Purpose Vehicle ["SPV"] for the Issuance of Sukuk – Section 60I Income Tax Act 1967 ["ITA 1967"]* to explain the tax treatment for a company that establishes a SPV for the issuance of *sukuk* under Section 60I of the ITA 1967.

The salient points of the abovementioned PR include:-

i. Section 60I of the ITA 1967

- Companies may establish SPV to obtain financing through the Islamic capital market for the purpose of fund raising via issuance of *sukuk*. With effect from the year of assessment ["YA"] 2007, the provisions under Section 60I of the ITA 1967 were introduced to provide the following incentives:-
  - SPV is not subject to income tax and does not have to comply with administrative procedures under the ITA 1967.
  - Companies establishing the SPV are given deductions on the issuance costs of *sukuk* incurred by the SPV and are taxed on the income received by the SPV.

ii. Definition and Purpose of SPV

- "**SPV**" means a company incorporated under the Companies Act 1965 or a company incorporated under the Offshore Companies Act 1990 which has made an election under Section 3A of the Labuan Offshore Business Activity Tax Act 1990 and established solely for the purpose of complying with the principles of *shariah* in the issuance of *sukuk* but excludes a company which issues asset-backed securities in a securitisation transaction lodged with the Securities Commission ["SC"] or approved by the Labuan Financial Services Authority.
- There are several purposes for establishing an SPV which, among others, are as follows:-
  - Financing
    - SPV can be used to finance new projects without increasing the debt burden of the company and without diluting existing shares. This allows investors to invest in specific projects without directly investing in the parent company.
  - Securitisation
    - Securitisation is a process of issuing securities by selling certain financial assets to a third party in order to obtain cash or as an instrument to acquire new funds at a lower and more attractive cost compared to borrowing directly from financial institutions.

iii. Tax Treatment for SPV Which is Established Solely for the Issuance of *Sukuk* Other Than Asset Backed *Sukuk*

- The tax treatment under the provisions of Section 60I of the ITA 1967 only applies to asset based *sukuk* or similar instruments. The income received and expenses incurred in *sukuk* transactions are deemed to be similar to the tax treatment of interest in conventional financing arrangements.
- Tax treatment for companies that establish SPV solely for issuing *sukuk*
  - The income received and the issuance costs incurred by the SPV are deemed to be received and incurred by the company that established the SPV ["Originator"]. The Originator is responsible for the tax assessment on all sources of income earned by the SPV and must comply with all the provisions under the ITA 1967.

    - The SPV is not subject to income tax and does not have to comply with administrative procedures under the ITA 1967.
- Broadening the tax treatment for Originator to include Real Estate Investment Trust ["REIT"] or Property Trust Fund under Section 60I(3A) of the ITA 1967 (effective YA 2015)
    - The amendment aims to extend the tax treatment to unit trusts approved by SC who established SPV solely for the purpose if the issuance of *sukuk*. With this amendment, REIT and Property Trust Fund is responsible for the tax assessment on all income earned by the SPV.
- Standardisation of tax treatment for SPV
    - The provision under Section 60I(4) of the ITA 1967 was introduced to provide that the special tax treatment given to SPV established under the Companies Act 2016 is also extended to SPV established under the Offshore Companies Act 1990.
    - This treatment is provided to SPV that makes the election under section 3A of the Labuan Offshore Business Activity Tax Act 1990 to be taxed under the ITA 1967.
    - This amendment is effective YA 2010.

iv. Tax Treatment Where the Provisions of Section 60I of the ITA1967 Are Not Applicable

- For a parent company that has established an SPV but does not meet the conditions under the provisions of Section 60I of the ITA 1967, the established SPV may claim deductions for the expenditure on the issuance of *sukuk* in accordance with the Income Tax (Deduction for Expenditure on Issuance of *Sukuk* and Retail *Sukuk* Structured pursuant to the Principle of *Wakalah*) Rules 2021.

Tax Exemption for BioNexus Status Company

The IRB has recently issued the following gazette Orders to provide tax exemption for BioNexus status company:-

- *Income Tax (Exemption) (No. 4) Order 2023*
- *Income Tax (Exemption) (No. 5) Order 2023*
- *Income Tax (Exemption) (No. 6) Order 2023*

The following are the salient points of the gazette Orders:-

i. Income Tax (Exemption) (No.4) Order 2023

- A company granted with BioNexus status ["qualifying company"] which carries out qualifying activity relating to agricultural biotechnology, industrial biotechnology and healthcare biotechnology is eligible for exemption from paying the income tax, restricted to 70% of the statutory income derived from a qualifying activity in the basis period for a year of assessment.
- For a new business, the exemption granted is for 10 consecutive years of assessment commencing from the first year of assessment in which the qualifying company derived its statutory income from its new business.
- For an expansion project, the exemption granted is for 5 consecutive years of assessment commencing from the first year of assessment in which the qualifying company derived its statutory income from the expansion project, and the first year of assessment shall not be earlier than the date the company is approved as BioNexus status company.
- Application must be submitted to the Malaysian Bioeconomy Development Corporation Sdn Bhd ["MBDC"] from 1st January 2019 until 31st December 2022 and comply with any conditions imposed by the Minister in relation to the application submitted.

ii. Income Tax (Exemption) (No. 5) Order 2023

- A qualifying company is given tax exemption equivalent to the amount of the qualifying capital expenditure ["QCE"] incurred in the basis period of a year of assessment for the purposes of a new business or expansion project, restricted to 70% of the statutory income for that year of assessment.
- The exemption shall be for a period of 5 consecutive years commencing from the date of the first QCE incurred by the company, as determined by the MBDC.
- Application must be submitted to MBDC from 1st January 2019 until 31st December 2022 and comply with any conditions imposed by the Minister in relation to the application submitted.

iii. Income Tax (Exemption) (No. 6) Order 2023

- A qualifying company which has been granted an exemption from payment of income tax under the Orders mentioned in (i) or (ii) above is eligible for further tax exemption in respect of statutory income derived from a qualifying activity for a period of 10 years commencing immediately after the exempt years of assessment as provided under the aforesaid Orders.
- The statutory income exempted from tax in the basis period for a year of assessment during the 10-year further exemption period is determined in accordance with the formula prescribed in Paragraph 5(4) of the Income Tax (Exemption) (No. 6) Order 2023.
- Application for exemption must be made in writing by a BioNexus status company and received by the Minister through MBDC not less than 6 months before the expiry of the exempt years of assessment.

For the purpose of the above Orders:-

"**BioNexus status company**" means a company incorporated under the Companies Act 2016 which is engaged in a business of life sciences such as biology, medicine, anthropology, ecology or any other branches of science, which deal with living organisms and their organization, life processes and relationships to each other and their environment.

Exemption from Capital Gains Tax on Disposal of Unlisted Shares of Companies

With the gazette of the Finance (No. 2) Act 2023, effective 1st January 2024, capital gains tax will be imposed on gains or profits made by a company, limited liability partnership, trust body or co-operative society from the disposal of shares of company incorporated in Malaysia not listed on the stock exchange.

The *Income Tax (Exemption) (No. 7) Order 2023* has been gazetted to provide a period of 2-month exemption from capital gains tax for disposal of unlisted shares made from 1st January 2024 to 29th February 2024. However, this exemption is not applicable to gains or profits from disposal of shares that is chargeable to tax under Section 4(a) of the ITA 1967.

Note: *For further information relating to the capital gains tax on disposal of unlisted shares of companies, kindly refer to our Tax Flash – October 2023 (Special Edition) and Tax Flash - November 2023 (Special Edition) issues.*

Extension of Incentive Period for East Coast Economic Region

Various tax incentives are given to qualifying persons undertaking qualifying activities or special qualifying activities in various sectors in the East Coast Economic Region ["ECER"] which include the states of Kelantan, Terengganu, Pahang and the district of Mersing, Johor.

The *Stamp Duty (Exemption) (No. 2) 2016 (Amendment) Order 2023* has been gazetted to provide an extension of the period for another two years, i.e. until 31st December 2024 (previously 31st December 2022) for stamp duty exemption on instruments executed for transfer of real property or lease of land or building used for the purposes of carrying on a qualifying activity.

Note: *For further information relating to the above incentive for ECER, kindly refer to our Tax Flash – August 2016 and Tax Flash – May 2022 issues.*

Appointment of Effective Date for Charging and Levying of Sales Tax on Low Value Goods

The Minister of Finance has appointed 1st January 2024 as the *effective date for charging and levying of sales tax on low value goods*.

Legislations in Relation to Low Value Goods

The following Regulations and Orders in relation to low value goods have been gazetted on the following dates and took effect from 1st January 2024:-

No.	Subject	Date Gazetted
1.	*Sales Tax (Determination of Low Value Goods) Order 2023*	28th December 2023
2.	*Sales Tax (Rate of Tax for Low Value Goods) Order 2023*	29th December 2023
3.	*Sales Tax (Low Value Goods) (Amendment) Regulations 2023*	

Note: *For further details, kindly refer to our Tax Flash – November 2023 issue.*

Sales Tax and Service Tax Regulations and Orders

The following Regulations and Orders have been gazetted on the following dates and took effect from 1st January 2024:-

No.	Subject	Date Gazetted
1.	*Sales Tax (Goods Exempted from Tax) (Amendment) (No. 2) Order 2023*	28th December 2023
2.	*Sales Tax (Customs Ruling) (Amendment) Regulations 2023*	29th December 2023
3.	*Service Tax (Customs Ruling) (Amendment) Regulations 2023*	
4.	*Service Tax (Amendment) (No. 2) Regulations 2023*	
5.	*Service Tax (Digital Service) (Amendment) Regulations 2023*	
6.	*Sales Tax (Amendment) (No. 2) Regulations 2023*	

Further, the *Sales Tax (Compounding of Offences) (Amendment) Regulations 2024* ["the Amended Regulations"] has been gazetted on 5th January 2024 but no effective date was specified in the Amended Regulations. The Royal Malaysian Customs Department ["RMCD"] has earlier confirmed that based on the Interpretation Acts 1948 and 1967, if the Amended Regulations is silent on the effective date, it will take effect on 6th January 2024, i.e. the date immediately following the date of publication of the Amended Regulations.

Sales Tax Exemption on Manufacturing Aids and Cleanroom Equipment

The *Sales Tax (Persons Exempted from Payment of Tax) (Amendment) (No. 3) Order 2023* ["the Exemption Order"] has been gazetted on 29th December 2023 and took effect from 1st January 2024.

Subject to the conditions stated in the Exemption Order, any person or manufacturer under Item 4 to Schedule B of the Exemption Order and Items 1 to 4 to Schedule C of the Exemption Order may apply for sales tax exemption on its acquisition of manufacturing aids and cleanroom equipment from 1st January 2024 onwards.

Sales tax exemptions for manufacturing aids and cleanroom equipment are specifically granted to items designated by the Director General of Customs and Excise ["DGRMC"]. These exempted items are comprehensively detailed in Appendices 1 and 2 of the *Ketetapan Umum Bil. 02/2024 : Alat Bantuan Pengilangan (Manufacturing Aids) dan Peralatan Cleanroom* (currently only made available in *Bahasa Malaysia*).

For manufacturing aids and cleanroom equipment not included in Appendix 1 and Appendix 2, the person or manufacturer seeking for a sales tax exemption is required to obtain a written approval from the DGRMC before proceeding with the application for a sales tax exemption certificate for those items not listed in the appendices. The application should be made to the Headquarters of the RMCD, Internal Tax Division by submitting the following documents:-

- Company's official letter;
- *The list of manufacturing aids in the prescribed format*; and
- *The list of cleanroom equipment in the prescribed format*.

For further information, please refer to the following guides:-

- *Guide on Sales Tax Exemption under Schedule B of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018* dated 29th December 2023 (currently only made available in *Bahasa Malaysia*); and
- *Guide on Sales Tax Exemption under Schedule C of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018* dated 29th December 2023.

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