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Extended Conditional Movement Control Order: IRB's guidance and concessions

Coverage of this Alert

- Frequently Asked Questions on International Tax issues due to COVID-19 travel restrictions
- Frequently Asked Questions on Tax matters during the Movement Control Order and the Conditional Movement Control Order period - updated on 15 May 2020

To mitigate the spread of the COVID-19 virus, most nations have imposed strict domestic and international travel restrictions. These travel restrictions may result in tax implications or concerns for taxpayers, such as:

- i) Failure to meet conditions necessary to maintain corporate and/or individual tax residency in a particular country (or even inadvertently creating residency elsewhere). For example, in some countries, the inability to hold a physical in-country board meeting during a tax year may result in a company no longer being regarded as a resident.
- ii) Permanent establishment (PE) (i.e. taxable business presence) risk, as individuals are forced to work and make business decisions outside their country of employment if they are stranded overseas
- iii) Employment income potentially being subject to tax outside the country of employment as individuals are forced to work overseas
- iv) Extended physical presence in a foreign country resulting in conditions to enjoy a tax exemption (under the relevant domestic law or tax treaty) no longer being met

To address such concerns, the Organization for Economic Co-operation and Development (OECD) and various countries have issued guidance and concessions to taxpayers.



The Malaysian Inland Revenue Board (IRB) has also recently published guidance, via a document titled “Frequently Asked Questions on International Tax Issues due to the COVID-19 Travel Restrictions” (FAQs) which has been uploaded on their website.

Broadly, the FAQs address questions pertaining to the following:

- A. Residency status for individuals and companies;
- B. Creation of PE for companies; and
- C. Cross-border employment income for individuals

Some of the key points are outlined below.

Q1 and Q2: Residency status for individuals

The FAQs stipulate that where a Malaysian resident is outside Malaysia due to the travel restrictions, his/her temporary absence from Malaysia will not affect his/her residency status in Malaysia. The period of temporary absence due to the travel restrictions shall be taken to form part of the period or periods in Malaysia for the purpose of determining his/her tax residency.

Where non-residents are temporarily present in Malaysia due to the travel restrictions, the period of temporary presence shall not be taken to form part of their period or periods in Malaysia for the purpose of determining their residency status.

Q3 and Q4: Residency status for companies

The FAQs stipulate that where a company is unable to convene its Board of Directors (BOD) meeting in Malaysia due to the travel restrictions, the IRB is prepared to presume that the company is a Malaysian-resident, provided that all the following conditions are met:

- a. The company is a Malaysian tax resident in the immediate previous year of assessment;
- b. There are no changes to the economic circumstance of the company¹; and
- c. The directors of the company have to attend the BOD meeting held outside Malaysia (either physical meeting or via electronic means) due to COVID-19 travel restrictions.

Editor’s note: This last point suggests that a BOD meeting still needs to be held in respect of the company, but it can be held outside Malaysia or electronically.

Conversely, if a non-resident company convenes its BOD meeting in Malaysia due to the travel restrictions, the IRB is prepared to presume that the company is a non-resident in Malaysia, subject to conditions.

¹ Economic circumstances are the principal activities and business model of the company; the nature of the business operations and the conduct of the business in Malaysia and elsewhere; and the usual locations in which the company operates.

Q5: Permanent establishment

The FAQs stipulate that where a company is not resident in Malaysia, the temporary presence of its employees or personnel in Malaysia will not lead to the creation of a PE in Malaysia, subject to the following conditions being met:

- a. The company did not have a PE in Malaysia before the existence of the COVID-19 travel restrictions;
- b. There are no other changes to the economic circumstances of the company;
- c. The temporary presence of the employees in Malaysia is solely due to travel restrictions relating to COVID-19; and
- d. The activities performed by the employees during their temporary presence would not have been performed in Malaysia if not for the COVID-19 travel restrictions.

Q6: Cross-border employment income for individuals commuting daily between Johor Bahru and Singapore

The FAQs stipulate that in cases where an individual used to commute daily between Johor Bahru (home) and Singapore (work location) but is currently forced to work from Malaysia due to travel restrictions, his/her employment income will not be considered to be derived from Malaysia. The following conditions must be met:

- a. There is no change in the contractual terms governing his/her employment overseas; and
- b. The work-from-home arrangement is temporary and is due to COVID-19 travel restrictions.

Q7 and Q8: Cross-border employment income for individuals

The FAQs stipulate that where an individual normally exercises his/her employment in Malaysia but is forced to work temporarily outside Malaysia due to travel restrictions, the individual is regarded to be exercising his/her employment in Malaysia. The income earned from working outside Malaysia is deemed derived from Malaysia and is hence taxable in Malaysia. However, the individual must also understand the taxation rules in the country where the individual is temporarily working from, taking into consideration any COVID-19 related special tax measures provided by the said country or relief granted via a tax treaty (where available).

Conversely, for a non-resident individual who is currently working in Malaysia for an overseas employer due to the travel restrictions, the individual will not be considered to be exercising an employment in Malaysia for the period of his/her temporary presence, provided that:

- a. The period of temporary presence in Malaysia is for a period of not more than 60 days; and
- b. The work performed during the temporary presence is not connected to an assignment in Malaysia and would have been performed overseas if not for COVID-19 travel restrictions.

The FAQs are available in the following link:

http://lampiran1.hasil.gov.my/pdf/pdfam/FAQ_on_International_Tax_Issues.pdf

Frequently Asked Questions on Tax matters during the Movement Control Order and the Conditional Movement Control Order period – updated on 15 May 2020

On 1 May 2020, the Government of Malaysia announced the Conditional Movement Control Order (CMCO), where most economic sectors would be allowed to operate from 4 May 2020, subject to their observing conditions and standard operating procedures that have been put in place to continue addressing the COVID-19 pandemic. The Movement Control Order (MCO) was previously meant to last until 12 May 2020. On 10 May 2020, the Government further announced that the CMCO would be in place for another four (4) weeks, until 9 June 2020.

Following the above, the IRB has issued an updated version of its “Frequently Asked Questions” document with respect to tax deadlines during the extended CMCO period, titled “Frequently Asked Questions on Tax Matters during the Movement Control Order and the Conditional Movement Control Order Period (18 March 2020 to 9 June 2020)” (IRB’s FAQs) dated 15 May 2020.

The IRB’s FAQs have been updated to reflect the IRB services that are available to taxpayers during the MCO or CMCO period. The FAQs document has been consistently updated throughout the MCO period. It is noted however that whilst the CMCO period has been extended, the extensions of time given in the earlier IRB’s FAQs remain unchanged.

The IRB’s FAQs are available via the following link:
http://lampiran1.hasil.gov.my/pdf/pdfam/faq_2.pdf

Access the latest EY tracker on global economic and state aid measures:

- https://www.ey.com/en_gl/tax/how-covid-19-is-causing-governments-to-adopt-economic-stimulus-

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