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Amended guideline on secretarial and tax filing fees

The Inland Revenue Board (IRB) issued an amendment dated 25 September 2017 to its guideline dated 8 February 2017 in relation to the tax deduction of secretarial and tax filing fees under the *Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2014* (“the Rules”). The amendments were made to address the following issues raised by the Chartered Tax Institute of Malaysia:

- (i) Scope of the tax filing fee
- (ii) Effective date of the deduction

The parts of the guideline which have been amended and the effects of the amendments are as follows:

Item2	Effect of amendments
Paragraph 4.3.3.	<p>The cost of tax agent advice and preparation of the company’s tax computation are included as part of the tax filing fee which is deductible under the Rules.</p> <p>However, the IRB has maintained its position that reimbursements and out-of-pocket expenses are not entitled for deduction as part of tax filing fees.</p>
Example 4	<p>It was stated in Example 4 of the old guideline (prior to the amendment) that the tax filing fee for year of assessment (YA) 2015 which was incurred in YA 2016 and paid in YA 2017 was not deductible. The reason cited was the deduction was only allowed for tax filing fee for YA 2016 and subsequent YAs.</p> <p>The IRB has now amended example 4 in the amendment to state that the reason for disallowance of the tax filing fee is due to the fact that the fees were not incurred <u>and</u> paid in YA 2016.</p> <p>The above reason is in accordance with the provisions of sub-paragraph 2(1)(b)(i) of the Rules, which states:</p> <p><i>“a deduction shall be allowed for...tax filing fee ...which is <u>incurred and paid</u> by the person in the basis period for that year of assessment in respect of the preparation and submission of return ...for the basis period for the immediately preceding year of assessment;...”</i></p> <p>However, the IRB has not specified in the amended example, if a tax deduction will be allowed in YA 2017 when the payment of the fee is made, as per the clarification they provided during the Dialogue for 2015 Budget on 4 February 2015. In the said dialogue, IRB clarified that a tax deduction will be given in the basis period for the YA in which the fee is paid even though the fees was incurred in an earlier year.</p> <p>The Chartered Tax Institute of Malaysia is seeking further clarification on this from the IRB.</p>

Both the said guideline and its amendment is available on IRB’s website www.hasil.gov.my (Laws and Regulation > Technical Guidelines).

Public Ruling 6/2017 – Withholding tax on income of a non-resident public entertainer

Further to the amendment to the meaning of “public entertainer” in section 2 of the Income Tax Act 1967 (ITA), the IRB has issued Public Ruling 6/2017 – Withholding tax on income of a non-resident public entertainer (“PR 6/2017”) dated 12 October 2017. This public ruling seeks to provide further explanation on the meaning of public entertainer, the withholding tax obligations imposed under the ITA, and the avenue for appeal by taxpayers.

Salient points to note from the public ruling include the following:

<p>Para 5.1 – Meaning of non-resident public entertainer</p>	<p>PR 6/2017 sets out 4 categories of activities carried out by a non-resident where the non-resident can be treated as a public entertainer:</p> <ul style="list-style-type: none"> a) performance*, or exercise of any profession, vocation or employment of a similar nature <i>for cultural, educational, entertainment, religious or any other purposes</i>; b) use of individual’s intellectual, artistic, musical, personal or physical skill or character <i>for cultural, educational, entertainment, religious or any other purposes</i>; c) lecture, speech, or talk for any purpose; d) a sporting event or sporting competition of any nature. <p>* solo or group performance; performance as actor, model, circus performer, compere, dancer, entertainer, musician, singer, other artiste.</p>
<p>Example 5 – Super model</p>	<p>The super-model participated in a fashion show, a commercial and a photo shoot for a fee of USD100,000. It was concluded in the public ruling that the super-model is considered a public entertainer <i>as she participated in a fashion show for the viewing of the public</i>.</p> <p>The above example raises a question on whether the IRB has changed its position with regards to Example 12 of Public Ruling 1/2014 – Withholding tax on Special Classes of Income (“PR 1/2014”), where it is stated that the fee paid to a model for a magazine photo shoot was subject to withholding tax under section 109B and not section 109A of the ITA.</p> <p>The reason cited in PR 1/2014 was that there was no element of entertainment during the photo shoot.</p>

<p>Examples 8 & 9 – Conference speaker / lecturer</p>	<p>In these examples, the following payments made to a non-resident are subject to withholding tax as public entertainer and not as technical services:</p> <p>(a) conference speaker (who is a renowned corporate leader), and (b) renowned university lecturer in finance.</p>
<p>Example 10 – Contestants in reality singing competition</p>	<p>It was stated in the example that since the non-resident contestants are <u>not</u> professional singers, the prize money may be taxable as other gains or profits and subject to withholding tax as gains or profits derived from Malaysia.</p> <p>However, cash prize money won by a foreign professional singer would be subject to withholding tax as income derived by a public entertainer as he is considered a public entertainer.</p>
<p>Examples 3 & 13 – Sports person</p>	<p>Prize money of a non-resident sports person is exempted from tax under <i>Income Tax (Exemption) (No. 23) Order 1990</i>. However, the out-of-pocket expenses, disbursements and payments received by the sports person for wearing the company's apparel are subject to withholding tax as income derived by a public entertainer .</p>

PR 6/2017 is available on IRB's website www.hasil.gov.my (Laws and Regulation > Public Rulings).

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