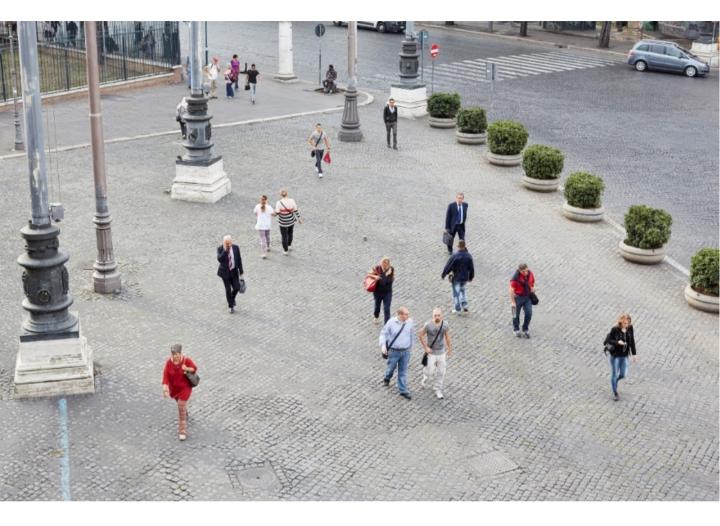


6 December 2018 | Issue 10-2018



Public Ruling 11/2018 – Withholding Tax on Special Classes of Income



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Public Ruling 11/2018 – Withholding Tax on Special Classes of Income

The IRB has issued <u>Public Ruling 11/2018 - Withholding Tax on Special Classes of Income</u> ("PR 11/2018") dated 5 December 2018, replacing the earlier <u>Public Ruling 1/2014 - Withholding Tax on Special Classes of</u> <u>Income</u> ("PR 1/2014"). PR 11/2018 essentially incorporates changes to the law since PR 1/2014 was issued as well as sets out changes in Inland Revenue Board's (IRB) positions with respect to certain matters, some of which take immediate effect from the date the new public ruling is published.

Regrossing no longer required

Effective from 5 December 2018, where a Malaysian payer bears the withholding tax on payments made to non-residents which fall within the Special Classes of Income category, the Malaysian payer is not required to regross the payment amount to compute the withholding tax due and payable to the IRB.

Changes in IRB's position

	Previous position in PR 1/2014	Revised position in PR 11/2018
Regrossing of payment made to non-resident in computing withholding tax (WHT) to be remitted to IRB in cases where the WHT is borne by the payer	Example 15 of PR 1/2014 illustrates that where WHT is borne by the payer and not recovered from the payee, the IRB requires the WHT that is to be remitted to them to be computed based on a regrossed sum (i.e. a sum which notionally assumes that the amount paid to the NR represents an amount that is net of WHT).	With effect from 5 December 2018, where WHT on Special Classes of Income is borne by a payer, no regrossing is required, i.e. the WHT that is required to be remitted to the IRB shall be computed based on the actual gross amount of payment to the non-resident under contract. (Paragraph 12.1 of PR 11/2018)
Testing services	In Example 23 of PR 1/2014, the IRB provided that "testing services for the provision of test results on finished products to meet required standards (certification) which do not involve technical advice or consultation" do not fall within the scope of Section 4A of the ITA and hence are not subject to WHT under Section 109B.	The IRB has stated in the public ruling that "testing and calibration" is an example of technical support which is caught under Section 4A(ii) of the ITA. Example 23 of PR 1/2014 is not reproduced in PR 11/2018. In its place, Example 12 provides that the provision of testing, measurement and calibration services are caught under Section 4A(ii) of the ITA. It is noted that the example does make a distinction on whether the services are for meeting certification standards.
		(Paragraph 7.2 and Example 12 of PR 11/2018) Our comments If you have relied on PR 1/2014 in making the decision to not withhold tax for payments made to non-residents for testing services (to meet standards certification), you should speak to your tax advisors to review the position.

Previous position in PR 1/2014

Allocation of expenses from head office

Expense allocation from head office in respect of "ordinary day-to-day or routine administration expenses which are in no way related to performance of any specialised service" is excluded from the scope of Section 4A(ii) of the Income Tax Act 1967 (ITA) and hence not subject to WHT under Section 109B of the ITA.

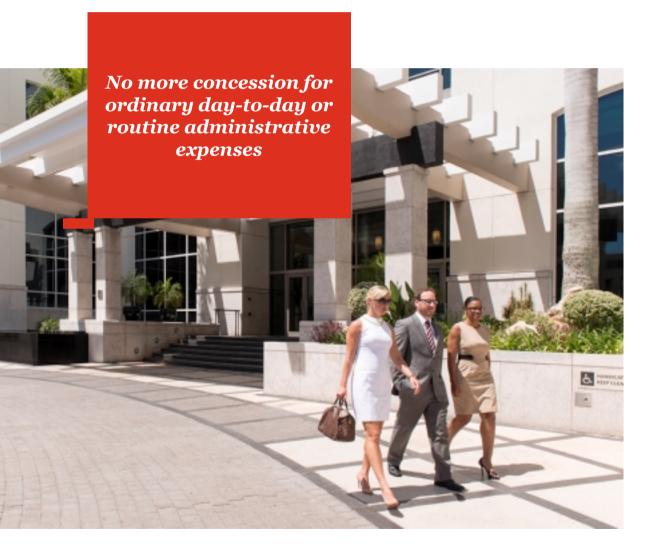
(Paragraph 8.4 and example 4 of PR 1/2014)

Revised position in PR 11/2018

The IRB has now deleted the specific exclusion set out in PR 1/2014.

Our comments

Since the specific exclusion is no longer provided in PR 11/2018, such payments would need to be examined to determine whether or not they are caught within the scope of Section 4A bearing in mind that IRB's prevailing position is that Section 4A(ii) covers both technical and nontechnical services.



Fees other than freight charges	 The IRB maintains its position from PR 1/2014 that freight charges are not caught under Section 4A(iii) of the ITA. The IRB has now added that fees other than freight charges such as handling and agency fees fall under Section 4A(ii) of the ITA and hence are subject to WHT. (Paragraph 8.2)
Applicable foreign	The following information is now set out in PR 11/2018:
exchange (Fx) rate in computing WHT to be	 Fx rate on date of payment to non-resident (as reflected in the telegraphic transfer) is to be used to calculate the WHT in Ringgit Malaysia.
remitted to the IRB.	Fx rate is based on rates published in the IRB or Bank Negara Malaysia's websites.
	(Paragraph 12.2)
Services in connection with royalties	The IRB has included a note to state that services in connection with use of property or rights belonging to a non-resident under the scope of the royalty definition, falls under the scope of Section 4A(i) and is subject to Section 109B WHT.
	(Paragraph 6.1)
Application of "Other Income" Article in tax treaties without a Technical Fee Article	The IRB's prevailing position that the Other Income Article is applicable to provide Malaysia with the right to impose WHT on a non-resident with no Permanent Establishment in Malaysia is now set out in PR 11/2018.
	(Paragraph 18.1)
	Our comments
	This position may be challenged by the non-resident recipient.

Other Income Article applies in the absence of a Technical Fee Article in tax treaties

New additions to PR 11/2018

Some of these changes may be controversial

You may be exposed to more withholding tax in view of IRB's position. This is an opportune time to review your withholding tax position and the technical ground thereof, taking into consideration the recent changes to Section 4A as proposed in Budget 2019.

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