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ARE YOUR OVERSEAS SECONDED EMPLOYEES SUBJECT TO INCOME TAX IN MALAYSIA?

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BY :

Sudharsanan Thillainathan &
Tania Kat-Lin Edward

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This article examines whether employees seconded overseas remain subject to Malaysian income tax, and the factors that determine whether such duties are considered "incidental" to their employment in Malaysia.

The recent High Court decision in **Ketua Pengarah Hasil Dalam Negeri v. Sudhakaran a/l Kesawan** (Civil Appeal No. WA-14-8-04/2025) provides timely guidance on this issue. Our Partners, Sudharsanan Thillainathan and Tania Edward, acted for and succeeded on behalf of the Taxpayer in this case. We are grateful to Malayan Banking Berhad for the opportunity to represent the Taxpayer before the SCIT and the High Court.

Background: LHDN v. Sudhakaran

The Taxpayer here was an employee of Malayan Banking Berhad ("**Maybank**") who was seconded overseas for approximately 7 years to a wholly owned subsidiary of Maybank in Papua New Guinea.

Upon the Taxpayer's return to Malaysia, the Inland Revenue Board Malaysia ("**LHDN**") asserted that the Taxpayer's overseas posting was incidental to his Malaysian employment. On this basis, the income that the Taxpayer received during those 7 years abroad was taxable under **Section 13(2)(c) of the Income Tax Act 1967** ("**ITA 1967**"), and imposed a penalty of 10%, followed by the imposition of another 5% ("**Impugned Tax Assessments**").

Maybank clarified that the Taxpayer's overseas secondment was not related or incidental to his employment in Malaysia. Nevertheless, LHDN proceeded with the assessments, prompting the Taxpayer to appeal.

Are Overseas Secondments Taxable in Malaysia?

Section 4 of the ITA 1967 states that income from gains or profits from an employment is taxable in Malaysia. **Section 13(2)(c) of the ITA 1967** goes on to clarify that if the employee performs duties outside of Malaysia that is incidental to their employment in Malaysia, this too is deemed income derived from Malaysia and is therefore taxable.

What Amounts are "Incidental" Duties?

The ITA 1967 does not define what constitutes "incidental" duties. Guidance, however, can be found in **Public Ruling No. 1/2011 (Taxation of Malaysian Employees Seconded Overseas)** ("**Public Ruling**"), which explains the tax treatment of Malaysian employees seconded overseas.

Specifically, **paragraph 7 of the Public Ruling** explains that "incidental" duties are those that are connected to the duties of the main employment in Malaysia, and constitute a necessary part of that employment. It is meant to fulfil the main part of the employment in Malaysia.

Paragraph 8 of the Public Ruling provides the 7 Factors and Circumstances that must be considered collectively in order to determine whether such duties are incidental to the employment in Malaysia. **Paragraph 10 of the Public Ruling** then illustrates these principles through case studies, demonstrating that the overseas secondment is taxable only if all 7 Factors and Circumstances are answered in the affirmative.

Are Public Rulings Binding?

The IRB is empowered to issue the Public Ruling under **Section 138A(1) of the ITA**.

As explained in **All Malayan Estates Staff Union (Amesu) v. Ladang Jeram Padang (Kuala Lumpur Kepong Berhad)** [2018] 3 ILR 54, public rulings are meant to be a guide to the public and also officers of LHDN on the interpretation of the Director General of Inland Revenue in respect of the particular tax law, and the applicable policies and procedures.[1] This is also clear from the preface of every public ruling which clarifies that it "sets out the interpretation of the Director General of Inland Revenue in respect of the particular tax law, and the policy and procedure that are to be applied."

Once a public ruling has been made, and a taxpayer applies such provisions according to the procedures stipulated, it is imperative for the Director General of Inland Revenue to apply such provisions accordingly under **Section 138A(3) of the ITA**. The binding nature of public rulings was also accepted in **UEM Edgenta Berhad v. Ketua Pengarah Hasil Dalam Negeri** [2021] 1 LNS 2528 (HC) where it was held that "Section 138A(3) of the ITA provides that a

[1] at [61].

public ruling is binding on the Respondent if a taxpayer applies that public ruling."[2]

In any event, a public ruling is an instrument made pursuant to an Act of Parliament and is therefore a binding piece of subsidiary legislation for the purposes of **Section 3 of the Interpretation Acts 1948 and 1967 (Act 388)**.

Therefore, absent any withdrawal of the public rulings by notice of withdrawal or by publication of a new public ruling, whether wholly or in part, LHDN is bound by the interpretations and procedures that public rulings elucidate.

Why the SCIT Found the Secondment Not "Incidental"

Aggrieved by the Impugned Tax Assessments, the Taxpayer filed an appeal to the Special Commissioners of Income Tax ("**SCIT**").

In determining whether the duties performed in Papua New Guinea were incidental to the employment in Malaysia, the SCIT had applied the 7 Factors and Circumstances collectively in the Public Ruling. The SCIT found that only 2 out of the 7 were answered in the affirmative, as submitted by the Taxpayer. Accordingly, the Taxpayer's duties in Papua New Guinea were not incidental to his Malaysian employment, and **Section 13(2)(c) of the ITA 1967** did not apply.

The Impugned Tax Assessments were therefore set aside.

Why the High Court Upheld the SCIT's Decision

LHDN appealed to the High Court.

The High Court was cognisant of the fact that appeals from the SCIT were only warranted in very limited circumstances. This high threshold for appellate intervention is due to the specialisation of the SCIT, being in a position to better appreciate the facts and evidence in their findings.

The SCIT is a specialised independent tax tribunal. The SCIT's specialisation, having special insight, understanding and appreciation of the evidence and facts to make the corresponding findings, was reinforced by the Court of Appeal in **Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2015] 4 MLJ 487 (CA).[3] It hears appeals from taxpayers who are dissatisfied with the income tax assessments by LHDN.

[2] at [13].
[3] at [25].

It was held that the SCIT had adequately and correctly appreciated the facts and law in arriving at its decision. In this regard, the Public Ruling was correctly applied and since only 2 of the 7 Factors and Considerations were answered in the affirmative, the Impugned Tax Assessments were properly set aside. The High Court thus held that appellate intervention was not warranted and dismissed the appeal.

Additional Arguments Raised by LHDN

Maybank remained the Employer

LHDN argued that the income remained taxable as Maybank continued to be the Taxpayer's employer.

However, this fact is irrelevant as the very definition of "seconded" under **paragraph 3.3 of the Public Ruling** implies that the employer does not change. It is therefore not a factor, still less controversial, who the employer is in determining whether the overseas secondment was subject to income tax assessments.

Continued EPF Contributions by Maybank

LHDN contended that the EPF contributions during the period of secondment supported the validity of the Impugned Assessments.

This too was irrelevant. Maybank remained the employer of the Taxpayer throughout the secondment and was required to make such contributions, with the costs ultimately borne by the subsidiary in Papua New Guinea.

Secondment to a Wholly Owned Subsidiary

The fact that the Taxpayer was seconded to a wholly owned subsidiary of Maybank in Papua New Guinea is irrelevant on trite principles of separate legal personality.

It is also important to note that none of the foregoing were considerations listed in the 7 Factors or Consideration in the Public Ruling to determine whether the duties performed overseas were incidental to the Malaysian employment. Accordingly, it should not be relied on to justify the imposition of income tax.

The Implications of LHDN v. Sudhakaran

The decision has important implications for companies in Malaysia that second employees overseas.

It provides much-needed clarity on how income tax applies in cross-border

secondment arrangements, including situations where the secondee may be subject to income tax in the host jurisdiction. This is commercially significant: companies and employees alike must be able to structure secondments with certainty and avoid exposure to unintended double taxation. In this case, the employee was subject to income tax in Papua New Guinea, and the Court's findings confirm the proper limits of the Inland Revenue Board's ability to tax such income in Malaysia.

Conclusion

Section 13(2)(c) of the ITA 1967 reflects Parliament's intention that not all overseas secondments are taxable. Only duties incidental would be subject to income tax assessments in Malaysia. Parliament acknowledges that the determination and implementation of specialised matters is more suitably placed in the hands of a body more conversant, and has thus thought it apt for the Director General of Inland Revenue to provide further detailed policies and procedures. The Public Ruling provides the necessary clarification, and **Section 138A of the ITA 1967** ensures that taxpayers are entitled to rely on it.

This decision is a welcome reinforcement of the binding nature of public rulings, providing some certainty to Malaysian employers on the tax treatment of employees seconded overseas. We again express our appreciation to Maybank for entrusting us with the conduct of this matter.

This article was written by our Dispute Resolution Team, Sudharsanan Thillainathan and Tania Kat-Lin Edward, with the assistance of Nathanael Chuah. It contains general information only. It does not constitute legal advice or an expression of legal opinion and should not be relied upon as such.