Malaysia:
Public Ruling No. 1/2011 and the flat tax rate incentive for returning Malaysian professionals

PR No 1/2011 on “Taxation of Malaysian Employees Seconded Overseas”

At present, the word “incidental” has not been defined in the Income Tax Act (ITA) of 1967 and the determination of whether an employee’s performance of duties outside Malaysia is incidental to Malaysian employment and the consequential tax implication on the employee, is subject to interpretation. Therefore, the meaning of the word incidental has to be referred to case laws.

Major changes in practice

The Malaysian Inland Revenue Board (MIRB) issued a new public ruling (PR) on 7 February 2011 (i.e. PR No. 1/2011) on “Taxation of Malaysian Employees Seconded Overseas” which is effective from the year of assessment 2011.

This PR explains the tax treatment of employment income derived by employees from Malaysia who are seconded by their employer to perform duties outside Malaysia. This PR is applicable to employees in Malaysia who are seconded overseas except for Malaysian citizens employed in public services or a statutory authority.

In determining whether the duties of employees performed overseas during secondment are incidental to the exercise of employment in Malaysia, the following factors and circumstances have to be considered collectively:

1. **Exercise of the employment in Malaysia** – Whether the employee exercised employment in Malaysia prior to his overseas secondment.
2. **Nature of overseas duties** – Whether the duties performed overseas are connected to or are part and parcel in the regular employment duties performed in Malaysia.
3. **Purpose of overseas duties** – Whether the duties performed overseas are to further the purposes of the employer in Malaysia.
4. **Temporary nature of the overseas duties** – Whether the overseas duties are temporary in nature and the employee is expected to resume work with his employer in Malaysia after the end of secondment.
5. **Place of direction and control** – Whether the place from where the duties are directed and controlled lies with an employer in Malaysia.
6. **Payment for services performed** – Whether the employer in Malaysia bears the remuneration cost of the employee during the overseas secondment.
7. **Commercial reality** – Whether the risk that was borne and the economic benefits that were received by the employer in respect of the deputies performed overseas reflect commercial reality.

Examples are provided in the PR to illustrate the factors mentioned above.

Deloitte’s view

There is now more clarity and guidance from the MIRB on the determination of incidental source of assignment for Malaysian employees seconded overseas.

This will enable the Malaysian employees to understand and conclude whether the filing of Malaysian individual tax return will still be required and what recourse is available if there is double taxation on income earned from the assignment.

Returning Experts Programme

As part of the Government’s initiative to push Malaysia into a high income economy by 2020, it was acknowledged that world-beating, top flight talents are critical to today’s knowledge-intense, innovation-led economy. Sectors have been identified under the National Key Economic Areas (NKEA) and the Talent Corporation was recently established to lead on the Returning Experts Programme (REP) to attract high value talents with the relevant industry experience for the sectors in NKEA.
In order to attract the returning Malaysian professionals with the adjustment to their income, a flat rate of 15% income tax for five years was announced on April 13, 2011 effective from the year of assessment, 2012.

**Deloitte’s view**

With the present highest marginal tax rate of 26%, the 15% flat income tax rate will be very attractive to encourage more Malaysians working abroad with their varied experience and expertise, to return and contribute to the country’s economic transformation. Options of tax planning will still be available to result in a more tax efficient remuneration package.

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