



INLAND REVENUE BOARD OF MALAYSIA

WITHHOLDING TAX ON SPECIAL CLASSES OF INCOME

PUBLIC RULING NO. 11/2018

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DIRECTOR GENERAL'S PUBLIC RULING

Section 138A of the Income Tax Act 1967 [ITA] provides that the Director General is empowered to make a Public Ruling in relation to the application of any provisions of the ITA.

A Public Ruling is published as a guide for the public and officers of the Inland Revenue Board of Malaysia. It sets out the interpretation of the Director General in respect of the particular tax law and the policy as well as the procedure applicable to it.

The Director General may withdraw this Public Ruling either wholly or in part, by notice of withdrawal or by publication of a new Public Ruling.

**Director General of Inland Revenue,
Inland Revenue Board of Malaysia.**

1. Objective

The objective of this Public Ruling (PR) is to explain the -

- (a) special classes of income that are chargeable to tax under section 4A of the Income Tax Act 1967 (ITA);
- (b) deduction of tax from special classes of income; and
- (c) consequences of not deducting and remitting the tax from special classes of income.

2. Relevant Provisions of the Law

- 2.1 This PR takes into account laws which are in force as at the date this PR is published.
- 2.2 The provisions of the ITA related to this PR are sections 2, 4A, 4B, 7 and 8, paragraphs 4(c) and 6(1)(e), section 15A, subsection 24(8), paragraph 39(1)(j), sections 98, 109B, 109H, subsection 113(2), section 131A, subsection 132(1) and Part V, Schedule 1 of the ITA.
- 2.3 The relevant subsidiary law referred to in this PR is Income Tax (Exemption) (No. 9) Order 2017 [P.U.(A) 323/2017].

3. Interpretation

The words used in this PR have the following meaning:

- 3.1 “Individual” means a natural person.
- 3.2 “Director General” means Director General of Inland Revenue.
- 3.3 “Person” includes a company, a body of persons, a limited liability partnership and a corporation sole.
- 3.4 “Resident person” is a person resident in Malaysia for the basis year for a year of assessment as determined under sections 7 and 8 of the ITA.
- 3.5 “Non-resident person” in relation to the payee, is a person other than a resident person.
- 3.6 “Double Tax Agreement (DTA) and protocols” means an agreement and its protocols entered into between the two governments of two countries to afford relief from double taxation.

3.7 “Special Commissioners” means the Special Commissioners of Income Tax referred to in section 98 of the ITA.

4. Special Classes of Income Chargeable to Tax

The income of a non-resident person from the following special classes of income is chargeable to tax in Malaysia if it is derived from Malaysia:

- (a) amounts paid in consideration of services rendered by the non-resident person or his employee in connection with:
 - (i) the use of property or rights belonging to him; or
 - (ii) the installation or operation of any plant, machinery or other apparatus purchased from him [paragraph 4A(i) of the ITA];
- (b) amounts paid to a non-resident person in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme [paragraph 4A(ii) of the ITA]; or
- (c) rent or other payments made under any agreement or arrangement to a non-resident person for the use of any moveable property [paragraph 4A(iii) of the ITA].

5. Derivation of Special Classes of Income

5.1 The gross income in respect of the amounts paid under paragraphs 4A(i), 4A(ii) and 4A(iii) of the ITA shall be deemed to be derived from Malaysia if:

- (a) the responsibility for the payment lies with the Government, a State Government or a local authority;
 - (b) the responsibility for the payment lies with a person who is resident in Malaysia for that basis year; or
 - (c) the payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.
- 5.2 Pursuant to section 6 of the Finance Act 2017 [Act 785], effective from 17.1.2017, income under paragraphs 4A(i) and 4A(ii) of the ITA which is derived from Malaysia is chargeable to tax in Malaysia regardless of whether the services are performed in or outside Malaysia.

However, with effect from 6.9.2017 the Minister of Finance exempts a person not resident in Malaysia from the payment of income tax in respect of income derived from Malaysia in relation to –

- (a) services referred to in paragraph 4A(i) of the ITA; or
- (b) technical advice, assistance or services referred to in paragraph 4A(ii) of the ITA

which are performed by the person outside Malaysia.

- 5.3 In a case where the contract requires performance of services both within and outside Malaysia, the proportion of contract value that is attributable to services performed in Malaysia must be ascertained in a manner that is fair and justifiable. Apportionment of the contract value should be based on the value of services performed in Malaysia. It is important that the contract value be apportioned on these bases according to the facts of each case as only the portion of contract value that is attributable to services performed in Malaysia is subject to withholding tax under section 109B of the ITA.

Example 1

Syarikat Maju Sdn Bhd, a Malaysian company signed an agreement with Excel Ltd, a non-resident company, to provide a report addressing the industry structure, market conditions and technology value for the Multimedia Super Corridor Grant Scheme. The consultant from Excel Ltd was in Malaysia for 6 days for preliminary discussion on the project. The total number of days spent on the whole project was 42 days from October to November 2017. The total fees paid for the project was RM20,000. The report was later completed overseas.

The proportion of the project value attributable to the services performed in Malaysia is computed on time cost.

Total fees for the project	RM20,000
Number of days spent on the whole project	42 days
Number of days spent in Malaysia	6 days
Time cost in Malaysia	RM2,857.14 (6/42 X 20,000)

The fees of RM2,857.14 is subject to a withholding tax of 10% under section 109B of the ITA.

6. Services Rendered in Connection with the Use or Installation or Operation of Assets [Paragraph 4A(i) of the ITA]

- 6.1 Paragraph 4A(i) of the ITA consists of amounts paid in consideration of services which are performed in or outside Malaysia, rendered by a non-resident person or his employee, in connection with:

- (a) the use of property or rights belonging to the non-resident person; or
- (b) the installation or operation of any plant, machinery or other apparatus purchased from him.

It should be noted that any services provided in connection with use of property or rights belonging to the non-resident person that falls under the scope of royalties would fall under the scope of paragraph 4A(i) of the ITA.

6.2 The following are examples of services that generate income falling within the scope of paragraph 4A(i) of the ITA:

- (a) Provision of personnel for advisory or supervisory services

Example 2

A Sdn Bhd bought a power plant from B Ltd, a company resident in India on 1.3. 2017. The terms of the purchase include installation of the plant by B Ltd. For this purpose, B Ltd sent two of its engineers to Malaysia to supervise the installation and operation of the plant from 15.4.2017 to 31.5.2017. The fees paid to B Ltd for the services was RM100,000.

The fees paid for services rendered by the employees of B Ltd in connection with the installation of a plant purchased from B Ltd are deemed derived from Malaysia and chargeable to tax under paragraph 4A(i) of the ITA. The gross amount paid to B Ltd is subject to withholding tax under section 109B of the ITA at the rate of 10%.

- (b) Installation and commissioning services

Example 3

Champ Ltd, a company resident in India, sold 3 stainless steel boilers to Doublesteel Sdn Bhd, a steel manufacturer in Malaysia at a price of RM1 million in March 2017. It was agreed that an additional sum of RM100,000 was payable to Champ Ltd for the installation services and commissioning of the boilers in Malaysia and at the Malaysian company's branch in United States of America (USA) in April 2017.

The payment for services rendered by Champ Ltd in connection with the installation and commissioning of a plant purchased from Champ Ltd in and outside Malaysia by Champ Ltd are deemed derived from Malaysia and chargeable to tax under paragraph 4A(i) of the ITA. The gross amount paid to Champ Ltd is subject to withholding tax under section 109B of the ITA at the rate of 10%.

7. Technical Advice, Assistance or Services Rendered in Connection with Technical Management or Administration [Paragraph 4A(ii) of the ITA]

7.1 Paragraph 4A(ii) of the ITA consists of amounts paid to a non-resident person in consideration of technical advice, assistance or services, which are performed in and outside Malaysia, rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme. The scope of payment made to the non-resident person includes payments for non-technical assistance and non-technical services.

7.2 Technical advice, assistance or services rendered in connection with technical management of any scientific, industrial or commercial undertaking, venture, project or scheme would include the passing over or utilisation of expert or specialised knowledge, skills or expertise. Among the examples of technical management include the provision of marketing, consultancy and legal services, supply of technical and software personnel, inter-company technical services and technical support such as testing and calibration services.

7.3 Administration would cover management or administrative services in connection with any scientific, industrial or commercial undertaking, venture, project or scheme. Among the examples of administration include non-technical assistance, non-technical services, management and administrative functions such as planning, direction, control, co-ordination, accounting, financial management consultation and labour negotiations.

7.4 The following are examples of services that generate income falling within the scope of paragraph 4A(ii) of the ITA:

- (a) Management or marketing services

Example 4

KMN International Hotel Management Ltd, a company resident in the United Kingdom (UK), entered into an agreement with ABC Hotel (M) Sdn Bhd in February 2017 to provide hotel management and marketing services in Malaysia in connection with:

- (i) the supervision and control of the general manager;
- (ii) the supervision and co-ordination of staff training and development programmes; and
- (iii) the promotion and marketing plans for the hotel in Malaysia.

Under the terms of the agreement, the Malaysian company will pay a monthly fee based on 5% of the gross turnover to KMN International

Hotel Management Ltd for the management and marketing services provided in Malaysia. In addition, an annual fee of 2% on gross overseas sales will be charged for marketing services performed overseas.

The fees for services rendered by KMN International Hotel Management Ltd in and outside Malaysia are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The monthly fees of 5% on the gross turnover and the annual fee of 2% on gross overseas sales paid to KMN International Hotel Management Ltd are subject to withholding tax under section 109B of the ITA at the rate of 10%. However, if it can be confirmed that KMN International Hotel Management Ltd is a tax resident in the UK, then the withholding tax rate is 8% pursuant to the DTA between Malaysia and UK.

Effective 6.9.2017, the annual fee of 2% on gross overseas sales is exempted from income tax as the services are rendered and performed by KMN International Hotel Management Ltd outside Malaysia.

For the purpose of this example, it is assumed that KMN International Hotel Management Ltd does not have a permanent establishment in Malaysia.

If the non-resident company has a permanent establishment in Malaysia, please refer to paragraph 19 in this PR for further information.

- (b) Consultancy services
 - (i) Fee for consultancy services

Example 5

Jet Engineering (M) Sdn Bhd, entered into an agreement in April 2017 with Jet Engineering Services (Asia) Pte Ltd, a Singapore company. The Singapore company would provide specialist or technical personnel to carry out engineering inspection and rectification works in Port Dickson, Kuantan, Melaka and Vietnam for a period of 2 months (May and June 2017). The total agreed fee was RM500,000 including RM150,000 which is attributable to the work done in Vietnam.

The fees for services rendered by Jet Engineering Services (Asia) Pte Ltd in and outside Malaysia are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The gross fee of RM350,000 is subject to withholding tax under section 109B of the ITA at the rate of 10%. If it can be confirmed that Jet Engineering Services (Asia) Pte Ltd is a tax resident in Singapore,

then the withholding tax rate is 5% as provided in the DTA between Malaysia and Singapore. The fee amount of RM150,000 relating to the services performed in Vietnam is exempted from withholding tax in the said DTA.

For the purpose of this example, it is assumed that Jet Engineering Services (Asia) Pte Ltd does not have a permanent establishment in Malaysia; and

If the non-resident company has a permanent establishment in Malaysia, please refer to paragraph 19 in this PR for further information.

- (ii) Fee for consultancy services includes reimbursement

Example 6

M & A Ltd, an architectural firm in London was engaged in April 2017 to provide plans for a modern hospital in Kuala Lumpur. Staff from the firm came several times to Malaysia for inspection of the site, discussions with the local company and finally delivered the master plan. The plans were drawn in its office in London. It was agreed that consultancy fees of RM1 million would include reimbursements payable by monthly invoices based on the progress of work done. The agreement also provided an analysis of the fees charged.

The fees for services rendered by M & A Ltd in and outside Malaysia are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The fees including reimbursements are subject to withholding tax under section 109B of the ITA at the rate of 10%. However, if it can be confirmed that M & A Ltd is a tax resident in the UK, then the withholding tax rate is 8% pursuant to the DTA between Malaysia and UK.

Effective 6.9.2017, the portion of the fees including reimbursements related to the services performed outside Malaysia is exempted from income tax.

For the purpose of this example, it is assumed that M & A Ltd does not have a permanent establishment in Malaysia.

If the non-resident company has a permanent establishment in Malaysia, please refer to paragraph 19 in this PR for further information.

- (iii) Monthly fees for consultancy services include reimbursement in respect of related expenses

Example 7

FGH (M) Sdn Bhd, is a hardware and software provider. The company had entered into an agreement with PQR Software Pte Ltd, a company in India. PQR would provide personnel to work with FGH to supply and implement an Integrated Cash Management System in a Malaysian bank in Malaysia. It was agreed that FGH would pay monthly fees which included reimbursements such as air tickets, local lodging, food and other related expenses.

The fees for services rendered by PQR are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The monthly fees which includes reimbursements are subject to withholding tax under section 109B of the ITA at the rate of 10%.

For the purpose of this example, it is assumed that PQR does not have a permanent establishment in Malaysia.

If the non-resident company has a permanent establishment in Malaysia, please refer to paragraph 19 in this PR for further information.

- (c) Legal services in connection with a debt or agency arrangement

Example 8

A legal firm resident in Spain was engaged by a Malaysian company in December 2017 to advise on matters regarding a debt reduction agreement and an agency agreement. The services were performed wholly in Malaysia.

The fees for services rendered in Malaysia by the legal firm are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The fees are subject to withholding tax under section 109B of the ITA at the rate of 10%. However, if it can be confirmed that the legal firm is a tax resident in Spain, then the withholding tax rate is 5% pursuant to the DTA between Malaysia and Spain.

- (d) Inter-company technical services

Example 9

Em Electric Canada Limited is a multi-national company dealing with different branded products in the fields of telecommunications, process management, storage solutions, industrial automation and other related

services. The Malaysian subsidiary, Em Technology Sdn Bhd, while undertaking projects for various Malaysian customers, always seeks assistance from the parent company or other subsidiaries not resident in Malaysia to provide technical training, project management and other related services.

Staff from the parent company and other subsidiaries in Canada are assigned to work in Malaysia for 3 months from June to August 2017. The salaries of the assigned staff are borne by the non-resident parent company or subsidiaries. The parent company or subsidiaries will issue debit notes to recover the staff cost and other reimbursements from Em Technology Sdn Bhd. A debit note is issued as an allocation of cost depending on the nature of the jobs involved.

The fees (debit notes) for technical assistance and service rendered by Em Electric Canada Limited and its subsidiaries are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The amount shown in the debit notes are subject to withholding tax under section 109B of the ITA at the rate of 10%.

For the purpose of this example, it is assumed that the Canadian company does not have a permanent establishment in Malaysia.

If the non-resident company has a permanent establishment in Malaysia, please refer to paragraph 19 of this PR for further information.

Note

In the absence of a Technical Fee Article in the DTA between Malaysia and Canada, the Income Not Expressly Mentioned Article is applicable. Please refer to paragraph 18(1)(b) of this PR for further information.

Example 10

AZ Sdn Bhd pays management fees to its parent company in the United States of America (USA). The parent company provided personnel to carry out the management services in Malaysia. The managerial services provided by the USA company to AZ Sdn Bhd are assistance, management and support in management, decision making, sales and business development, financial decision making, legal matters, public relations activities, risk management service and other management support as mutually agreed by AZ Sdn Bhd and its parent company. The managerial services are rendered wholly in Malaysia.

The fees for services rendered by the parent company in Malaysia are deemed derived from Malaysia and chargeable to tax under paragraph

4A(ii) of the ITA. The fees are subject to withholding tax under section 109B of the ITA at the rate of 10%.

(e) Specially-tailored training course

Specially-tailored training courses that are specifically designed to meet the business needs of a company in connection with a company project for a specific group of people may fall under paragraph 4A(ii) of the ITA.

Example 11

Aircraft Services Sdn Bhd and Dublin Aerospace, Ireland entered into a joint venture agreement to provide maintenance and repair services of aircrafts in Malaysia. Dublin Aerospace is required to provide technical assistance to Aircraft Services Sdn Bhd in Malaysia. An aircraft engineer from Dublin Aerospace who is an expert in aircraft engineering was assigned to conduct a 2 week course in Malaysia for the aircraft technicians from Aircraft Services Sdn Bhd. This course was specially-tailored to provide training in relation to the maintenance and repair of the latest aircrafts. Payment was made to Dublin Aerospace.

The payment to Dublin Aerospace for the aircraft engineer to conduct the specially-tailored training course to meet the business needs of the project in Malaysia is deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The gross payment is subject to withholding tax under section 109B of the ITA at the rate of 10%.

(f) Testing and calibration services

Example 12

Safety Products Sdn Bhd made payments to Inspec Ltd, a company based in France, in consideration for its services in providing testing, measurement and calibration services from 1.4.2017 to 20.4.2017.

The fees for services rendered by Inspec Ltd are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The gross amount paid to the company in France is subject to withholding tax under section 109B of the ITA at the rate of 10%.

For the purpose of this Example, it is assumed that the company in France does not have a permanent establishment in Malaysia.

If the non-resident company has a permanent establishment in Malaysia, please refer to paragraph 19 in this PR for further information.

8. Rent or Other Payments Made under any Agreement for Use of Moveable Property [Paragraph 4A(iii) of the ITA]

8.1 Paragraph 4A(iii) of the ITA consists of rents or other payments made to non-residents for the use of any moveable property which include rents or other payments made for the use of oil rigs, boats, ships, cars, aircraft or other equipment in or outside Malaysia. The following are activities falling within the scope of paragraph 4A(iii) of the ITA:

(a) Slot hire / charter

Slot hire / charter is where the hirer / charterer has exclusive use of a particular slot / space in a ship / aircraft to the exclusion of others. Payments paid for slot hire / charter are subject to withholding tax at 10% on the gross amount.

(b) Leasing of ships / aircrafts

Leasing of a ship / aircraft is the exclusive use of a ship / aircraft which is chartered, whether bare boat / dry lease or with crew / wet lease. Payments made to non-residents who lease out ships /aircrafts fall within the ambit of paragraph 4A(iii) of the ITA and are subject to a withholding tax at 10% on the gross receipt.

(c) Time charter

Time charter is where a ship / aircraft is chartered for a specific time. Thus, if a ship / aircraft is chartered, say for 3 years, withholding tax at 10% on the gross amount must be deducted from the payment or the charter fees paid in respect of the use of the ship / aircraft.

(d) Voyage charter

Voyage charter is in respect of a particular voyage / flight, i.e a predetermined route. If a ship / aircraft is chartered in respect of a particular voyage / flight, the charter fee received is subject to withholding tax at 10% on the gross fees.

8.2 The following income does not fall within the scope of paragraph 4A(iii) of the ITA:

Freight charges

Freight charges paid to non-residents in respect of export/import of goods do not fall within the scope of paragraph 4A(iii) of the ITA as freight charges are fees for the shipment of goods and not payments for the use of a moveable property.

However, fees other than freight charges for the shipment of goods such as handling fees and agency service fees falls under the scope of paragraph 4A(ii) of the ITA and would be subject to withholding tax under section 109B of the ITA.

8.3 The following income which is chargeable to tax under paragraph 4A(iii) of the ITA are specifically given exemption under the Income Tax (Exemption) Orders:

8.3.1 Pooling arrangements

A non-resident deriving income under paragraph 4A(iii) of the ITA consisting of payments made under an agreement or arrangement for participation in a pool by a company resident in Malaysia engaged in the business of transporting passengers or cargo by sea is specifically exempted from payment of income tax under the Income Tax (Exemption) (No.25) Order 1995 [P.U. (A) 322/1995]. Consequently, withholding tax under section 109B of the ITA shall not apply to the exempted income.

8.3.2 Income received from a Malaysian shipping company

(a) A non-resident person in Malaysia deriving income under paragraph 4A(iii) of the ITA from a Malaysian shipping company, consisting of payments made under any agreement or arrangement for the use of a ship is specifically exempted from payment of income tax under the Income Tax (Exemption) Order 2007 [P.U.(A) 58/2007].

The income is in relation to the use of the ship on a voyage charter or time charter or bare boat charter. Consequently, withholding tax under section 109B of the ITA shall not apply to the exempted income. The exemption is effective from 2.9.2006.

(b) For the purposes of this exemption, the words below have the following meaning:

“ship” means a sea-going ship other than a ferry, barge, tug-boat, supply vessel, crew boat, lighter, dredger, fishing boat or other similar vessel”.

“Bare boat” means a ship which is chartered without crew and the charterer has the exclusive use of the ship for a period or for a voyage,

“Malaysian ship” means a sea-going ship registered under the

Merchant Shipping Ordinance 1952, and

“Malaysian shipping company” means a resident company incorporated under the Companies Act 1965 or Companies Act 2016, which owns a Malaysian ship and carrying on a business of –

- (i) transporting passengers or cargoes by sea on a ship, or
- (ii) letting out a ship.

8.3.3 Income derived from the rental of International Standard Organisation (ISO) containers by a Malaysian shipping company

A non-resident person who receives income derived from the rental of ISO containers by a Malaysian shipping company is exempted from withholding tax from 20.10.2001 under the Income Tax (Exemption) (No. 24) Order 2002 [P.U.(A) 210/2002].

For the purpose of this exemption, Malaysian shipping company has the same meaning as in subparagraph 8.3.2(b).

9. Reimbursements

9.1 Reimbursements refer to out-of-pocket expenses incurred by the payee -

- (a) in the course of rendering services to the payer, or
- (b) in respect of the use of any moveable property,

and are subsequently reimbursed by the payer. Such expenses include the cost of airfare, travelling, accommodation, telephone and photocopying charges.

9.2 Reimbursements are considered as being part of the contract value for services rendered or for rent or payments made for the use of moveable property. As such, it is income of the payee under section 4A of the ITA and is subject to withholding tax at the rate of 10% on the gross amount under section 109B of the ITA.

9.3 Reimbursements on hotel accommodation are not included in the computation of gross income falling under section 4A of the ITA for the purposes of withholding tax. This exemption is aimed at reducing the cost of services provided by non-residents. Hotel accommodation means accommodation in a hotel, apartment hotel, service apartment, motel or hostel in or outside Malaysia.

10. Disbursements

10.1 Disbursements are out-of-pocket expenses incurred by the payer and paid to a third party on behalf of the payee -

- (a) in connection with services rendered by the payee, or
- (b) in respect of the use of any moveable property.

Disbursements are considered as being part of the contract value for services rendered or for rent or payments made for the use of any moveable property. As such, it is income to the payee under section 4A of the ITA and is subject to withholding tax at the rate of 10% on the gross amount under section 109B of the ITA.

10.2 Disbursements on hotel accommodation in or outside Malaysia are not included in the computation of gross income falling under section 4A of the ITA for the purposes of withholding tax. The purpose of this exemption is similar to that of reimbursement, i.e. is to reduce the cost of services provided by non-residents.

Example 13

SH Pte Ltd, a Singapore company, rendered technical services to Roadworks Sdn Bhd in March 2017. The services were performed in Malaysia. SH Pte Ltd issued an invoice dated 15.6.2017 for the value of RM1,000. Roadworks Sdn Bhd paid the cost of air fares of RM500 for the representative of SH Pte Ltd to XS Airlines (XS) on 15.3.2017. These expenses were classified as travelling expenses in the profit and loss account of Roadworks Sdn Bhd. Upon receiving the invoice, Roadworks Sdn Bhd paid RM900 to SH Pte Ltd and subsequently remitted the balance of RM100 to the Director General.

The gross amount paid to SH Pte Ltd is subject to withholding tax under section 109B of the ITA at the rate of 10%.

However, if it can be confirmed that SH Pte Ltd is a tax resident in Singapore, then the withholding tax rate is 5% pursuant to the DTA between Malaysia and Singapore. The payer should remit the sum of RM100 to the DGIR within one month after the payment for the services has been paid or credited to SH Pte Ltd.

The disbursements or out-of-pocket expenses of RM500 incurred by Roadworks Sdn Bhd are subject to withholding tax under section 109B of the ITA. Even though the payment for the airfare to XS is made in full, withholding tax of RM50 (10% X RM500) should be borne by the payee and the payer should remit the sum of RM50 to the DGIR within one month after the payment of the airfare has been paid or credited to XS.

The total amount of withholding tax charged on the payee should be:

			RM	
10%	X	RM1,000	=	100.00
10%	X	RM500	=	<u>50.00</u>
				<u>150.00</u>

The payer may subsequently recover the amount of tax of RM50.00 from SH Pte Ltd.

For the purpose of this example, it is assumed that SH Pte Ltd did not submit documentary proof of its resident status.

11. Advance Payments and Deposits

11.1 Advance payments and non-refundable deposits paid to a non-resident payee -

- (a) for services to be rendered, or
- (b) in respect of the use of any moveable property

under section 4A of the ITA form part of the gross income of a contract and would be subject to withholding tax under section 109B of the ITA.

On the other hand, deposits paid upon the signing of an agreement for technical services, which are refundable upon completion of the service do not form part of the gross income of a contract.

11.2 Advance payments and non-refundable deposits for technical services performed in and outside Malaysia are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. Even though the services are yet to be performed, the advance payment or non-refundable deposit made are purely for the services which will be performed and form part of the gross amount payable for the services. The advance payment and non-refundable deposit would be subject to withholding tax under section 109B of the ITA at the rate of 10%.

12. Deduction of Tax

12.1 Income tax shall be charged for each year of assessment upon the income of a non-resident person chargeable to tax under section 4A of the ITA which is derived from Malaysia, at the rate of 10% on the gross amount as provided in Part V, Schedule 1 of the ITA.

- (a) Withholding tax borne by payee

Example 14

New World Pte Ltd, a company based in China, rendered technical services to Teknik Sdn Bhd, valued at RM150,000. Teknik Sdn Bhd's financial year ending is 31 December. The service was performed in Malaysia from 16.4.2017 to 24.4.2017. Upon completion of the service, New World Pte Ltd issued an invoice dated 28.4.2017 to Teknik Sdn Bhd for the services rendered. Teknik Sdn Bhd settled the technical service fees to New World Pte Ltd on 8.5.2017.

The fees for technical services performed in Malaysia are deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The gross amount paid to New World Pte Ltd is subject to withholding tax at 10% under section 109B of the ITA.

Computation of Withholding Tax

Technical service fees	RM 150,000
Less:	
Withholding tax (10%)	<u>15,000</u>
Payment due to New World Pte Ltd	<u>135,000</u>

Teknik Sdn Bhd should remit the withholding tax deducted of RM15,000 to the DGIR within one month after the payment to New World Pte Ltd has been paid or credited, which is on or before 8.6.2017. The amount of technical service fees that can be allowed a deduction in computing the adjusted business income of Teknik Sdn Bhd for the year of assessment 2017 is RM150,000.

- (b) Withholding tax borne by payer

Example 15

The facts are the same as in Example 14 except that Teknik Sdn Bhd contracted to pay the full amount of the technical service fees of RM150,000 to New World Pte Ltd. Teknik Sdn Bhd also undertakes to bear and pay the withholding tax to the DGIR within the stipulated period.

For the financial year ended 31.12.2017, Teknik Sdn Bhd claimed the following as an expense in its profit and loss account.

	RM
Technical service fees paid to New World Pte Ltd	150,000
Add:	
Withholding tax paid to the DGIR	15,000
Amount claimed in the profit and loss account	<u>165,000</u>

Only the technical service fees of RM150,000 is deductible in computing the adjusted business income of Teknik Sdn Bhd for the year of assessment 2017. The withholding tax (tax of New World Pte Ltd) borne by Teknik Sdn Bhd is not an allowable expense being not wholly and exclusively incurred in the production of its gross income.

Note

Effective from the date of publication of this PR, where withholding tax under section 109B of the ITA is borne by a payer, the withholding tax is to be computed on the gross amount paid to a non-resident. This means that the payment made to the non-resident need not be regressed to determine the amount of withholding tax.

- 12.2 For purposes of determining the amount of withholding tax where payment to a non-resident is made in non-ringgit currency, the equivalent Ringgit Malaysia (RM) value has to be calculated at the time payment is made at the –
- (i) prevailing foreign exchange rate on the date the payment is made (the rate would be reflected in the telegraphic transfer);
 - (ii) rate published in the official portal of IRBM; or
 - (iii) rate published by Bank Negara Malaysia.

The withholding tax is to be computed based on the amount in RM on the date payment is made to the non-resident.

- 12.3 Withholding tax under section 109B of the ITA is a final tax. However, if a non-resident payee has income from other sources other than income under section 4A of the ITA, he is required to file an Income Tax Return Form (Form C or Form M). The income under section 4A of the ITA may be included in the return, in which case this income will be subject to tax at the rate of 10% and a set-off under section 110 of the ITA will be given for the withholding tax paid in computing his tax payable for a year of assessment [paragraph 109B(3)(a) of the ITA].

13. Remittance of Tax Deducted

13.1 A payer, normally a person carrying on a business in Malaysia, is responsible for deducting and remitting the withholding tax payment under section 109B of the ITA to the DGIR and pay the recipient (a non-resident person) the net amount. The payer must within one month after paying or crediting the recipient pay the withholding tax so deducted to the DGIR. For the purpose of this PR, the terms crediting, crediting in a contra situation and date of crediting have the following meaning:

- (a) "Crediting" in relation to an amount means more than a mere journal entry or an accrual of the liability in the accounts of the payer and an amount is considered as having been credited if the amount is available to or for the benefit of the non-resident payee;
- (b) "Crediting in a contra situation" means a situation in which the amount is made available to offset any amount owing by the non-resident payee in the company's records; and
- (c) "Date of crediting" refers to the date the amount is paid or the date the amount is credited in the bank account of the recipient or the date of a contra entry.

The payer is required to complete Form C.P.37D and submit the following particulars:

- (a) Name, address and income tax reference number of the payer,
- (b) Full name, address, country and income tax reference number of the payee,
- (c) Copies of invoice or debit note (if applicable), and
- (d) Bank remittance slip or other documentary evidence showing the date the amount is paid or credited.

Form C.P.37D can be downloaded from the official portal of the Inland Revenue Board of Malaysia (IRBM) at <http://www.hasil.gov.my>.

Example 16

Bell Pte Ltd, tax resident in Hong Kong, rendered technical services to Ark Sdn Bhd from 20.1.2017 to 31.1.2017, whereby Bell Pte Ltd performed the services in Malaysia. Bell Pte Ltd issued an invoice dated 2.2.2017 valued at RM1 million for the services rendered. Ark Sdn Bhd settled the payment by crediting RM600,000 in a contra situation with Bell Pte Ltd and crediting the balance of RM400,000 into Bell Pte Ltd's bank account. The date of crediting of the payments by contra entry and crediting the bank account was on 31.3.2017.

The fee of RM1 million for the services performed in Malaysia is deemed derived from Malaysia and chargeable to tax under paragraph 4A(ii) of the ITA. The gross amount paid to Bell Pte Ltd is subject to withholding tax under section 109B of the ITA at the rate of 10%. However, if it can be confirmed that Bell Pte Ltd is a tax resident in Hong Kong, then the withholding tax rate is 5% pursuant to the DTA between Malaysia and Hong Kong.

13.2 Payment can be made at the following three Payment Centres:

STATE	ADDRESS
Peninsular Malaysia	Lembaga Hasil Dalam Negeri Malaysia Pusat Bayaran Kuala Lumpur Tingkat Bawah & 15, Blok 8A Kompleks Pejabat Kerajaan Jalan Tuanku Abdul Halim, Karung Berkunci 11061 50990 Kuala Lumpur
Sabah & Federal Territory of Labuan	Lembaga Hasil Dalam Negeri Malaysia Pusat Bayaran Kota Kinabalu Tingkat Bawah, 3 & 4 Menara Hasil Jalan Tuanku Abdul Rahman 88600 Kota Kinabalu
Sarawak	Lembaga Hasil Dalam Negeri Malaysia Cawangan Kuching Pusat Bayaran Kuching Unit Operasi Kutipan Cukai Aras 1, Wisma Hasil No 1, Jalan Padungan 93100 Kuching

Payment can also be made through Telegraphic Transfer / Transfer Interbank Giro / Electronic Fund Transfer to IRBM's bank account. Unlike other tax payments, withholding tax cannot be paid at the banks.

13.3 In cases where the income tax reference number of the payee is not available when filling up the Form C.P.37D, the payer has to make a request for the income tax reference number of the payee from Cawangan Tidak Bermastautin (Non-Resident Branch) by writing in or sending through facsimile an application letter together with full details of the payee to:

Lembaga Hasil Dalam Negeri Malaysia
Unit Profiling
Cawangan Tidak Bermastautin
Tingkat 3, Blok 8, Kompleks Bangunan Kerajaan
Jalan Duta, 50600 Kuala Lumpur
Fax. Number : 03 - 6201 9745 / 6201 2417

- 13.4 Under special circumstances, depending on the merits of the case, the DGIR may allow extension of time for the tax deducted to be paid over.

14. Consequences of Not Deducting and Remitting Tax

- 14.1 Where a payer fails to deduct and remit any amount of withholding tax due to the DGIR under subsection 109B(1) of the ITA, that amount which he fails to pay shall be increased by 10% of the amount of withholding tax which he fails to pay and the total sum shall be a debt due from him to the Government and shall be payable to the DGIR [subsection 109B(2) of the ITA].

Example 17

Golden Sdn Bhd failed to deduct and remit tax of RM5,000 due and payable on 30.4.2017, on a payment of RM50,000 chargeable to tax under section 4A of the ITA to Bright Spark Ltd (a company based in China). That sum which Golden Sdn Bhd failed to pay shall be increased by RM500 (10% of RM5,000). The total sum of RM5,500 shall be a debt due to the Government.

- 14.2 Where the payment in respect of section 4A income is subject to withholding tax under section 109B of the ITA and the payer fails to deduct and remit the tax to the DGIR in accordance with subsection 109B(1) of the ITA, such payment will be disallowed as an expense in the computation of the adjusted income from any source of the payer [paragraph 39(1)(j) of the ITA]. However, if the payer subsequently pays the withholding tax together with the increased amount (as stated in paragraph 14.1), that payment under section 4A of the ITA made to the non-resident can be subsequently allowed as a deduction [proviso to paragraph 39(1)(j) of the ITA].

Although the expenses are incurred under subsection 33(1) of the ITA, a deduction is not allowable under paragraph 39(1)(j) of the ITA if the withholding tax is not paid or remitted to the DGIR.

- 14.3 Effective 1.1.2011, for year of assessment 2011 and subsequent years of assessment, in addition to the late payment penalty mentioned in paragraph 14.1 above, where -
- (a) the withholding tax deduction is made or paid after the due date for the furnishing of an ITRF for a year of assessment that relates to the payment of the section 4A income, and

- (b) a deduction for expenses related to such payment is made in the ITRF furnished or claimed on the information given to the DGIR in arriving at the adjusted income of the payer

the tax or amount so paid shall not prejudice the imposition of penalty under subsection 113(2) of the ITA [proviso (ii) to paragraph 39(1)(j) of the ITA].

In other words, if a payer claims a deduction in the ITRF for expenses that are subject to withholding tax whereas the withholding tax has not been paid or remitted, the DGIR is empowered to impose a penalty under subsection 113(2) of the ITA for incorrect returns. This applies regardless of whether the ITRF has been filed within / after the due date for submission for the relevant year of assessment.

Where the withholding tax is not due for payment and no payment or crediting is made to the non-resident payee on or before the due date of submission of the ITRF, a deduction is not allowable under paragraph 39(1)(j) of the ITA if the withholding tax is not paid or remitted to the DGIR.

Example 18

Powerplant Pte Ltd, a company resident in India, rendered technical services to Tokoh Sdn Bhd (accounting period ends on 31 December annually) worth RM50,000, whereby Powerplant Pte Ltd had performed the services in Malaysia in January 2015. Tokoh Sdn Bhd made the payment of RM50,000 to Powerplant Pte Ltd on 29.8.2015 but did not comply with the withholding tax provisions pertaining to the above-mentioned services. ITRF for year of assessment 2015 was submitted to IRBM on 31.7.2016 with a chargeable income of RM1 million and the tax payable was RM250,000. Tokoh Sdn Bhd claimed a deduction for the technical fee.

During a tax audit in October 2016, the findings showed that Tokoh Sdn Bhd claimed a deduction in the ITRF although no withholding tax was deducted and remitted to the DGIR. IRBM informed Tokoh Sdn Bhd to remit the withholding tax and penalty amounts due under subsection 109B(2) of the ITA but Tokoh Sdn Bhd failed to do so.

The total amount of technical fees of RM50,000 was disallowed as a deduction for tax purposes for the relevant year of assessment pursuant to paragraph 39(1)(j) of the ITA. An additional assessment was issued on 30.11.2016 and a penalty under subsection 113(2) of the ITA was imposed for incorrect returns.

Year of Assessment 2015	RM
Deemed Assessment	
Tax payable (RM1,000,000 x 25%)	250,000
Additional Assessment (after audit by IRBM)	
Chargeable income	1,000,000
Add:	
Technical fee	<u>50,000</u>
Adjusted chargeable income	<u>1,050,000</u>
Tax charged (RM1,050,000 X 25%)	262,500
Less:	
Original tax payable	<u>250,000</u>
Tax underdeclared	12,500
Penalty under subsection 113(2) of the ITA (100%) [proviso (ii) to paragraph 39(1)(j) of the ITA]	<u>12,500</u>
Additional tax payable	<u>25,000</u>

The withholding tax amounting to RM5,000 which Tokoh Sdn Bhd failed to pay was increased by RM500 (10% of RM5,000) under subsection 109B(2) of the ITA. The total sum of RM5,500 shall be a debt due to the Government. Legal action may be taken by the DGIR pursuant to subsection 106(1) of the ITA to recover the amount of withholding tax and increase of tax due.

If the withholding tax and penalty under subsection 109B(2) of the ITA is subsequently paid, the technical fee of RM50,000 would be allowed as a deduction since an incorrect return was filed on 31.7.2016. Pursuant to proviso (ii) to paragraph 39(1)(j) of the ITA, the penalty under subsection 113(2) of the ITA will be maintained.

Example 19

The facts are the same as in Example 18 except that Tokoh Sdn Bhd paid the withholding tax and penalty of RM5,500 on 15.12.2016 after receiving the additional assessment.

The additional assessment dated 30.11.2016 would be amended by issuing a reduced assessment. However, the penalty under subsection 113(2) of the ITA for filing an incorrect return for year of assessment 2015 will be maintained.

Year of Assessment 2015	RM
Additional Assessment (after audit by IRBM)	
Additional tax	12,500
Penalty under subsection 113(2) of the ITA (100%)	<u>12,500</u>
Additional tax payable	<u>25,000</u>
Reduced Assessment (after withholding tax paid on 15.12.2016)	
Adjusted chargeable income	1,050,000
Less:	
Technical fee paid	<u>50,000</u>
	<u>1,000,000</u>
Tax charged (RM1,000,000 X 25%)	250,000
Penalty under subsection 113(2) of the ITA [proviso (ii) to paragraph 39(1)(j) of the ITA]	12,500
Tax payable	<u>262,500</u>
Less:	
Tax payable on 30.11.2016 (RM250,000 + RM25,000)	<u>275,000</u>
Tax discharged	<u>12,500</u>

Example 20

The facts are the same as in Example 18 except that the ITRF for year of assessment 2015 was submitted on 31.7.2016 with NIL chargeable income.

Year of Assessment 2015	RM
Deemed Assessment	
Chargeable income	Nil
Tax payable	Nil
Additional Assessment (after audit by IRBM)	
Chargeable income	Nil
Add:	
Technical fee	<u>50,000</u>
Adjusted chargeable income	<u>50,000</u>
Tax charged (RM50,000 X 25%)	12,500
Less:	

Original tax payable	Nil
Tax underdeclared	12,500
Penalty under subsection 113(2) of the ITA (100%) [proviso (ii) to paragraph 39(1)(j) of the ITA]	12,500
Additional tax payable	<u>25,000</u>

Example 21

The facts are the same as in Example 20 except that Tokoh Sdn Bhd paid the withholding tax and penalty of RM5,500 on 15.12.2016 after receiving the additional assessment.

The additional assessment dated 30.11.2016 would be amended by issuing a reduced assessment. However, Tokoh Sdn Bhd would still be penalised under subsection 113(2) of the ITA for filing an incorrect return for year of assessment 2015 although the tax payable is Nil.

Year Of Assessment 2015	RM
Additional Assessment (after audit by IRBM)	
Additional tax	12,500
Penalty under subsection 113(2) of the ITA (100%)	12,500
Additional tax payable	<u>25,000</u>
Reduced Assessment (after withholding tax paid on 15.12.2016)	
Adjusted chargeable income	50,000
Less:	
Technical fee paid	<u>50,000</u>
	Nil
Tax charged	Nil
Penalty under subsection 113(2) of the ITA [proviso (ii) to paragraph 39(1)(j) of the ITA]	12,500
Tax payable	<u>12,500</u>
Less:	
Tax payable on 30.11.2016	<u>25,000</u>
Tax discharged	<u>12,500</u>

Example 22

The facts are the same as in Example 18 except that in the agreement between Tokoh Sdn Bhd and Powerplant Pte Ltd, there was a clause stating that Tokoh Sdn Bhd would be charged penalty for late payment of 5% on any

unpaid amount if it fails to make the payment due to Powerplant Pte Ltd by 29.8.2015. Tokoh Sdn Bhd paid Powerplant Pte Ltd RM52,500 (amount due of RM50,000 + 5% late payment penalty of RM2,500) on 30.12.2015. Tokoh Sdn Bhd did not deduct and remit the withholding tax due and payable.

The total amount of technical fee and late payment penalty claimed of RM52,500 was disallowed as a deduction for tax purposes for the relevant year of assessment pursuant to paragraph 39(1)(j) of the ITA.

An additional assessment was issued and a penalty under subsection 113(2) of the ITA was imposed as shown in Example 18.

The withholding tax is 10% of the gross technical fee of RM50,000. No withholding tax was imposed on the late payment penalty of 5% (RM2,500) as according to Article 11(4) of the DTA between Malaysia and India, penalty charges for late payment shall not be regarded as interest for the purposes of Article 11. The withholding tax amounting to RM5,000 which Tokoh Sdn Bhd failed to pay shall be increased by RM500 (10% of RM5,000). The total sum of RM5,500 shall be a debt due to the Government.

The penalty charges for late payment of RM2,500 would not be a deductible expense under subsection 33(1) of the ITA.

Note

In cases where late payment penalty is paid to a non-resident by a payer, it should be ascertained whether that late payment penalty is considered an interest income. In the absence of a DTA between Malaysia and the country of residence of the non-resident or if there is a DTA and there is no mention whether late payment penalty is regarded as interest income or not, the domestic tax laws of Malaysia shall prevail. Pursuant to section 4B of the ITA, the late payment interest which is payable to the non-resident would be considered as interest income under paragraph 4(c) of the ITA. As such, the withholding tax provision under section 109 of the ITA is applicable.

Example 23

The facts are the same as in Example 18 except that the withholding tax was paid late on 10.9.2016 and the ITRF for the year of assessment 2015 was submitted late on 30.9.2016.

The withholding tax amounting to RM5,000 which Tokoh Sdn Bhd failed to remit within one month after the payment was paid or credited (29.8.2015) to Powerplant Pte Ltd was increased by RM500 (10% of RM5,000) under subsection 109B(2) of the ITA.

Tokoh Sdn Bhd was subject to a penalty for late submission of the ITRF under subsection 112(3) of the ITA.

14.4 Effective 1.1.2012, pursuant to subsection 39(3) of the ITA, where a payer enjoys full tax exemption on his income from all sources for the basis period for a year of assessment under –

- (a) the Promotion of Investments Act 1986 (PIA),
- (b) paragraph 127(3)(b) of the ITA, or
- (c) subsection 127(3A) of the ITA

and fails to remit withholding tax on the expenditure incurred and payable to a non-resident in respect of –

- (i) interest or royalties under section 109 of the ITA,
- (ii) contract payments under section 107A of the ITA, or
- (iii) any payments under sections 109B or 109F of the ITA

the deductions disallowed under paragraphs 39(1)(f), 39(1)(i) or 39(1)(j) of the ITA are not applicable to that payer.

However, deductions disallowed under paragraphs 39(1)(f), 39(1)(i) or 39(1)(j) of the ITA are still applicable to the payers who enjoy tax exemption on income equal to capital expenditure incurred, (i.e. Investment Tax Allowance).

14.5 It is to be noted that eventhough a payer who is liable to make payments to a non-resident payee –

- (a) enjoys a full tax exemption on his income from all sources under the PIA or ITA;
- (b) has been granted an investment tax allowance; or
- (c) has incurred losses (no chargeable income)

in the basis period for a year of assessment, the payer after paying or crediting the payment is required to deduct and remit the withholding tax under section 109B of the ITA to the DGIR.

Any payment made to a non-resident payee that is claimed as an expense, in the computation of the adjusted income from any source of the payer, would be disallowed if the payer fails to comply with the withholding tax requirements regardless of the fact that the payer has incurred a loss (no chargeable income) in the basis period for a year of assessment.

Example 24

Co. A made an application for a tax exemption on income under subsection 127(3A) of the ITA to the Minister of Finance. A tax exemption on the statutory income of the company was approved by the Minister of Finance under subsection 127(3A) of the ITA in 2014 for a period of 5 years with effect from year of assessment 2014. Co. A paid technical service fees amounting to RM50,000 to Co. B in Indonesia on 30.6.2016 without deducting and remitting any withholding tax payment. Co. A claimed deductions for the technical service fees in the profit and loss account for the year ended 31.12.2016.

**Computation of Statutory Income
Year of Assessment 2016**

Details	RM
Adjusted income (after audit)	500,000
Add:	
Technical service fees [paragraph 39(3)]	<u>Nil</u>
Adjusted income	500,000
Less:	
Capital allowance	<u>100,000</u>
Statutory income	<u>400,000</u>

For the year of assessment 2016, Co. A enjoyed full tax exemption under subsection 127(3A) of the ITA and had failed to remit the withholding tax under section 109B of the ITA. Therefore, pursuant to subsection 39(3) of the ITA, the technical service fees of RM50,000 paid to Co. B in Indonesia would not be added back in the tax computation.

It is to be noted the technical fees of RM50,000 is a Malaysian-derived income of the non-resident and that the withholding tax amounting to RM5,000 which Co. A failed to pay will be increased by RM500 (10% of RM5,000) under subsection 109B(2) of the ITA. The total sum of RM5,500 shall be a debt due to the Government. Legal action shall be taken by the DGIR pursuant to subsection 106(1) of the ITA to recover the amount of withholding tax and increase of tax due.

Example 25

Co. X, a high technology company was granted investment tax allowance under the PIA and its financial year end is 31 December. Co. X paid technical fees of RM200,000 to Co. Y in the UK on 1.6.2016 without remitting withholding tax. Co. X is eligible to claim investment tax allowance amounting to RM6,000,000 (60% of RM10,000,000 incurred on qualifying capital expenditure) for the year of assessment 2016. Co. X was granted a tax exemption of 100% of its statutory income.

For the purpose of this example it is assumed that Co. Y did not submit documentary proof of its resident status.

**Computation of Total Income
Year of Assessment 2016**

Details	RM
Adjusted income (after audit)	350,000
Add:	
Technical service fees [paragraph 39(1)(j)]	<u>200,000</u>
Adjusted income	550,000
Less:	
Capital allowance	<u>100,000</u>
Statutory income	450,000
Less:	
Investment tax allowance (against 100% of statutory income)	<u>450,000</u>
Total income / Chargeable income	<u>Nil</u>
Investment tax allowance	6,000,000
Investment tax allowance absorbed in current year	<u>450,000</u>
Unabsorbed investment tax allowance c/f	<u>5,550,000</u>

Co. X failed to remit the withholding tax of RM20,000 (10% of RM200,000) for the year of assessment 2016. The payment of RM200,000 in respect of technical fees paid to Co. Y in the UK would be added back in the tax computation as Co. X enjoyed an exemption on its statutory income equal to capital expenditure incurred.

Example 26

Co. M was granted investment tax allowance under the PIA on 30.11.2015 for 5 years. Co. M commenced operations on 1.2.2015 and its financial year end is 31 December.

Co. M paid technical fees of RM200,000 to Co. F in the UK on 1.6.2016 without remitting withholding tax. Co. M is eligible to claim investment tax allowance amounting to RM6,000,000 (60% of RM10,000,000 incurred on qualifying capital expenditure) for the year of assessment 2016. The investment tax allowance is restricted to 70% of the statutory income of Co. M. For the purpose of this example it is assumed that Co. F did not submit documentary proof of its resident status.

**Computation of Total Income
Year of Assessment 2016**

Details	RM
Adjusted income (after audit)	350,000
Add:	
Technical service fees [paragraph 39(1)(j)]	<u>200,000</u>
Adjusted income	550,000
Less:	
Capital allowance	<u>100,000</u>
Statutory income	450,000
Less:	
ITA (restricted to 70% of statutory income)	<u>315,000</u>
Total income / Chargeable income	<u>135,000</u>
Investment tax allowance	6,000,000
Investment tax allowance absorbed in current year	<u>315,000</u>
Unabsorbed investment tax allowance	<u>5,685,000</u>

Co. M failed to remit the withholding tax of RM20,000 (10% of RM200,000) for the year of assessment 2016. The payment of RM200,000 in respect of technical fees paid to Co. F in the UK is disallowed under paragraph 39(1)(j) of the ITA as Co. M enjoyed a partial exemption (70%) on its statutory income equal to capital expenditure incurred.

Example 27

The facts are the same as in Example 26 except that Co. M was not granted investment tax allowance under the Promotion of Investments Act 1986 but had suffered an adjusted loss in the year of assessment 2016.

**Computation of Statutory Income
Year of Assessment 2016**

Details	RM
Adjusted loss (after audit)	(350,000)
Add:	
Technical service fees [paragraph 39(1)(j)]	<u>200,000</u>
Adjusted loss (c/f)	(150,000)
Current year capital allowance 100,000 (c/f)	_____
Statutory income	<u>Nil</u>

Co. M failed to remit the withholding tax of RM20,000 (10% of RM200,000) for the year of assessment 2016. The payment of RM200,000 in respect of technical fees paid to Co. F in the UK is disallowed under paragraph 39(1)(j) of the ITA although Co. M has no chargeable income (incurred loss) for the year of assessment 2016.

14.6 Where the payer when making payments to the non-resident person has not deducted withholding tax but undertook to pay the withholding tax himself to the DGIR, the payer may recover that amount of the withholding tax from that non-resident person [paragraph 109B(3)(b) of the ITA].

15. Appeal by Payer on Payment of Withholding Tax

Effective 1.1.2013 a payer who is liable to make payment of withholding tax under section 109B of the ITA may appeal to the Special Commissioners if the basis is that the withholding tax payment is not liable to be paid under the ITA. The appeal has to be made within 30 days from the date the amount is due to be made to the DGIR.

However, an appeal cannot be made by the payer under the following circumstances:

- (a) the non-resident person has filed an appeal to the Special Commissioners in relation to the payment under section 4A of the ITA to which the withholding tax relates,
- (b) the payment under section 4A of the ITA to the non-resident has been disallowed as a deduction under section 39 of the ITA in arriving at the adjusted income of the payer, or
- (c) the withholding tax due has not been paid to the DGIR by the payer.

[section 109H of the ITA]

16. Application for Relief Other Than in Respect of Error or Mistake

Effective 1.1.2017, a payer who has furnished to the DGIR a return for a year of assessment and has paid tax for that year of assessment may file an application for relief if the payer alleges that the assessment relating to that year of assessment is excessive. The assessment is said to be excessive where a deduction is not allowed in respect of payment not due to be paid under subsection 109B of the ITA on the day the return is furnished. The payer may make an application in writing to the DGIR within one year after the end of the year the payment is made.

[section 131A of the ITA]

17. Clarification on Due Date of Payment

If the last day of the period for remitting payment is a weekly holiday or a public holiday in Malaysia, the period will include the next working day. In other words, if the due date for payment of withholding tax falls on a weekly holiday (Saturday and Sunday) or a public holiday in Malaysia, the following working day would be considered as the due date for payment. Payers have to ensure that all payments are received by the Payment Centres by the due date.

Example 28

Maxwell Malaysia Bhd in Kuala Lumpur paid technical fees of RM150,000 to Sconil Co. Ltd on 19.1.2017 for services performed in Malaysia. Maxwell Malaysia Bhd has to remit withholding tax deducted of RM15,000 to the DGIR within one month after paying or crediting the technical fees to Sconil Co. Ltd, which is 19.2.2017 (Sunday).

As the due date for payment (19.2.2017) falls on a Sunday, a weekly holiday in Kuala Lumpur, the next working day, Monday (20.2.2017) is therefore the due date for payment.

18. Agreement for the Avoidance of Double Taxation

Malaysia has entered into agreements with a number of countries for the avoidance of double taxation and prevention of fiscal evasion.

18.1 Where a DTA has been signed with a particular country, the DTA –

- (a) would generally include a Technical Fees / Fees for Technical Services Article which provides that technical fees derived or arising from Malaysia may be taxed in Malaysia (i.e. subject to withholding tax in Malaysia). The DTA may provide for preferential rates of withholding tax on fees for technical services in the Technical Fees / Fees for Technical Services Article. To be eligible for the preferential rate, a written confirmation in the form of a letter or certificate from the revenue authority of the relevant country confirming the resident status of the payee has to be submitted together with the CP37D.
- (b) may not have a Technical Fee / Fees for Technical Services Article. In such a case, the Royalty Article (where applicable) as in the DTA with Spain or the Other Income / Income Not Expressly Mentioned Article as in the DTA with China, Thailand, Canada would be applicable.

18.2 Where Malaysia has not entered into a DTA or there is a limited DTA with a particular country, the domestic tax laws of Malaysia shall prevail.

18.3 Mutual Understanding Specific to the DTA between Malaysia and Australia

Pursuant to 1999 Malaysia-Australia DTA Protocol on the tax treatment of technical service fees, where an Australian enterprise furnishes services, including consultancy services in Malaysia through employees or other personnel engaged by the enterprise for such purpose and Article 5(4)(c) of the DTA is not applicable, an exemption from withholding tax is provided. **This exemption is only specific to the Malaysia-Australia DTA and does not extend to the other DTAs.**

Where the services are provided in Malaysia by employees or other personnel engaged by the Australian enterprise for a period or periods aggregating more than 3 months within any 12 month period, the enterprise is deemed to have a permanent establishment in Malaysia. If the enterprise of Australia has a permanent establishment in Malaysia as the conditions in the DTA are fulfilled, withholding tax under section 107A of the ITA would be applicable.

19. Withholding Tax under Section 109B and 107A of the ITA

Section 109B is applicable to non-residents in respect of income falling under section 4A of the ITA. However, if a payment to a non-resident in respect of paragraphs 4A(i) or 4A(ii) of the ITA is in relation to a contract project in Malaysia, which results in –

- (a) the setting up of a permanent establishment in Malaysia (where a DTA applies); or
 - (b) a business presence in Malaysia (in the absence of a DTA)
- and the payment is in relation to that contract project, then the withholding tax provision under section 107A of the ITA would be applicable.

Example 29

An engineering company in Singapore was engaged to carry out engineering inspection and rectification works in Johor Bahru over a period of 9 months in connection to a contract project in Malaysia.

Pursuant to Article 5(4) of the DTA between Malaysia and Singapore, a Singaporean enterprise shall be deemed to have a permanent establishment in Malaysia if it carries on supervisory activities in Malaysia for more than 6 months in connection with a building site or a construction, installation or assembly project which is being undertaken in Malaysia.

The services carried out by the Singaporean company is in relation to a contract project involving engineering inspection and rectification works. The Singapore company carried out supervisory activities in connection with a building site and construction in Malaysia for more than 6 months in Malaysia. Therefore, the

Singapore company is deemed to have a permanent establishment in Malaysia by virtue of Article 5(4) of the said DTA.

The Singapore company would be subject to withholding tax under section 107A of the ITA on the payment made for services carried out in Malaysia.

20. Existing Contracts Prior to Amendment of Section 15A of the ITA

In the case of contracts already existing before the coming into force of the amendment to Section 15A of the ITA on 17.1.2017, whether the income of a non-resident which falls under paragraphs 4A(i) or (ii) of the ITA **for services performed outside Malaysia** are subject to withholding tax under section 109B of the ITA would depend on when the service is performed and the date payment is made to the non-resident payee.

For services performed outside Malaysia by a non-resident before 17.1.2017 and payment is made to the non-resident either before or after 17.1.2017, the payment would not be subject to withholding tax under section 109B of the ITA.

Where services are performed outside Malaysia by a non-resident from 17.1.2017 onwards and payment is made to the non-resident before 17.1.2017, the payment would not be subject to withholding tax under section 109B of the ITA. On the other hand, if the payment is made to the non-resident from 17.1.2017 onwards, the payment would be subject to withholding tax under section 109B of the ITA.

A summary of whether withholding tax under section 109B of the ITA is applicable to services performed outside Malaysia under existing contracts signed before 17.1.2017 are as follows:

Date Contract Signed	Period of Performance Outside Malaysia	Date Payment Made to Non-Resident	Withholding Tax under Section 109B applicable?
17.1.2017 onwards	17.1.2017 to 5.9.2017	17.1.2017 onwards	Yes
Before 17.1.2017	Before 17.1.2017	Before 17.1.2017 or 17.1.2017 onwards	No
Before 17.1.2017	17.1.2017 to 5.9.2017	Before 17.1.2017	No
Before 17.1.2017	17.1.2017 to 5.9.2017	17.1.2017 onwards	Yes

Example 30

Worldwide Go Sdn Bhd entered into an agreement on 1.9.2016 with a non-resident company in Germany for consultancy services and technical advice in connection with the installation of a plant in Malaysia. The agreed contract value was RM1.24 million. The income received by the non-resident company falls under the special classes of income under section 4A(ii) of the ITA. Part of the services were performed in Malaysia from 1.12.2016 to 31.12.2016 whereas the rest of the services were performed in Germany from 1.1.2017 to 31.1.2017. Worldwide Go Sdn Bhd made the full payment to the non-resident company on 15.2.2017.

The payment in relation to the consultancy services and technical advice performed in and outside Malaysia would be subject to withholding tax under section 109B of the ITA as follows:

Service Performance Period	Place of Performance	Date of Payment	Withholding Tax under Section 109B applicable?
1.12.2016 – 31.12.2016	Malaysia	15.2.2017	Yes
1.1.2017 – 16.1.2017	Germany	15.2.2017	No
17.1.2017 – 31.1.2017	Germany	15.2.2017	Yes

The proportion of contract value that is attributable to services performed in and outside Malaysia must be ascertained in a manner that is fair and justifiable. Apportionment of the contract value should be based on the value of services performed in Malaysia.

The proportion of the project value attributable to the services performed in and outside Malaysia is computed based on time cost.

Total fees for the project	RM1,240,000
Number of days spent on the whole project	62 days
Number of days spent in Malaysia	31 days
Time cost in Malaysia for the period from 1.12.2016 to 31.12.2016	RM620,000 (31/62 X 1,240,000)
Number of days spent in Germany	31 days
Time cost in Germany (1.1.2017 to 31.1.2017)	RM620,000 (31/62 X 1,240,000)
Time cost in Germany for the period from 17.1.2017 to 31.1.2017	RM300,000 (15/31 X 620,000)

- (i) The fee of RM620,000 attributable to the services performed in Malaysia for the period from 1.12.2016 to 31.12.2016 would be subject to withholding tax of 10% under section 109B of the ITA.
- (ii) The fee of RM300,000 attributable to the services performed in Germany for the period from 17.1.2017 to 31.1.2017 would be subject to withholding tax of 10% under section 109B of the ITA.
- (iii) The fee attributable to the services performed in Germany prior to 17.1.2017 would not be subject to withholding tax of 10% under section 109B of the ITA.

For the purpose of this example, it is assumed that the German company did not submit documentary proof of its resident status.

21. Withholding Tax Exemption on Income from Services Performed Outside Malaysia on or After 6.9.2017

Pursuant to the Income Tax (Exemption) (No. 9) Order 2017 [P.U.(A) 323/2017], effective 6.9.2017 payments to non-residents that fall under paragraphs 4A(i) or (ii) of the ITA **for services performed outside Malaysia** are exempted from withholding tax under section 109B of the ITA.

In the case of contracts already existing before the coming into force of the withholding tax exemption on 6.9.2017, whether the income of a non-resident which falls under paragraphs 4A(i) or (ii) of the ITA **for services performed outside Malaysia** are subject to withholding tax under section 109B of the ITA would depend on when the service is performed.

For services performed outside Malaysia by a non-resident on or after 6.9.2017 and payment is made to the non-resident either on or after 6.9.2017, the payment would be exempted from withholding tax under section 109B of the ITA.

A summary of whether the exemption of withholding tax under section 109B of the ITA is applicable to services performed outside Malaysia under existing contracts signed before or after 6.9.2017 is as follows:

Date Contract Signed	Period of Performance Outside Malaysia	Date Payment Made to Non-Resident	Subject to Withholding Tax under Section 109B?
6.9.2017 onwards	6.9.2017 onwards	6.9.2017 onwards	No
Before 6.9.2017	17.01.2017 to 5.9.2017	Before 6.9.2017 or 6.9.2017 onwards	Yes
Before 6.9.2017	6.9.2017 onwards	Before 6.9.2017 ¹	No
Before 6.9.2017	6.9.2017 onwards	6.9.2017 onwards	No

¹For contracts that are signed and payment has been made before 6.9.2017, but services are performed outside Malaysia on or after 6.9.2017, such payments are not subject to withholding tax and a claim for a refund of the withholding tax paid can be made.

22. Examination of Transactions

The DGIR reserves the right to examine the position of a transaction more closely where circumstances so require.

23. Updates and Amendments

	Amendment	
This PR replaces the PR No. 1/2014 dated 23.1.2014.	The contents of this PR have been amended as follows:	
	Paragraph	Explanation
	2 to 11, 12 to 15, 17, 22	Paragraphs 2, 3 to 12, 14 to 17, 18 and 19 in the previous PR are renumbered as paragraphs 23, 2 to 11, 12 to 15, 22 and 17.
	16, 18 to 21	New paragraphs 16, 18 to 21 and 25 are inserted. Paragraphs 13 and 20 in the previous PR are deleted.
	2	Paragraph 3 in the previous PR is amended and renumbered as paragraph 2.
	3.3, 3.5, 3.6	New definitions are inserted.
	5	Paragraph 6.2 in the previous PR is amended and renumbered as paragraph 5.2. Example 1 is amended.
	6 and 7	Paragraph 7.1 in the previous PR is amended and renumbered as paragraph 6.1. Paragraphs 8.1 to 8.4 in the previous PR are amended and renumbered as paragraph 7.1 to 7.3. Paragraph 8.5 in the previous PR is amended and renumbered as

		<p>paragraph 7.5.</p> <p>Examples 2, 3, and 11 are amended.</p> <p>Example 4 in the previous PR is deleted.</p> <p>Examples 5, 7, 8, 9, 10 and 11 in the previous PR are amended and renumbered as Examples 4, 5, 7, 8, 9 and 11.</p> <p>A new Example 10 is inserted.</p> <p>Example 12 in the previous PR is deleted. Please refer to Example 5 in PR No. 6/2017 titled Withholding Tax on Income of a Non-Resident Public Entertainer dated 12.10.2017.</p>
	8	<p>Paragraphs 9.1 and 9.2 in the previous PR are amended and renumbered as paragraphs 8.1 and 8.2.</p>
	9	<p>Paragraph 10.3 in the previous PR is deleted.</p> <p>Examples 13 and 14 in the previous PR are deleted.</p>
	10	<p>Paragraph 11.2 in the previous PR is deleted.</p> <p>Example 15 in the previous PR is amended and renumbered as Example 13.</p> <p>Examples 16 and 17 in the previous PR are deleted.</p>
	11	<p>Paragraph 12 in the previous PR is amended and renumbered as paragraph 11.</p> <p>Examples 18 and 19 in the previous PR are deleted.</p>

		<p>Example 23 in the previous PR is amended and renumbered as Example 12.</p> <p>Example 12 is effective from the date of publication of this PR.</p>
	12	<p>Paragraph 14.1 in the previous PR is amended.</p> <p>Examples 24 and 25 in the previous PR are amended and renumbered as Examples 14 and 15.</p> <p>Paragraph 14.3 in the previous PR is amended and renumbered as paragraph 12.3.</p> <p>A new paragraph 12.2 is inserted.</p>
	13	<p>Paragraphs 15.2 and 15.3 in the previous PR are amended and renumbered as paragraphs 13.2 and 13.3.</p> <p>Example 26 in the previous PR is amended and renumbered as Example 16.</p>
	14	<p>Paragraph 16.2 in the previous PR is deleted.</p> <p>Paragraph 16.3 in the previous PR is amended and renumbered as paragraph 14.2.</p> <p>Paragraph 16.4 in the previous PR is amended and renumbered as paragraph 14.3.</p> <p>A new paragraph 14.5 is inserted.</p> <p>Examples 27, 29, 30 and 31 in the previous PR are amended and renumbered as Examples 17, 18, 19 and 22.</p> <p>New Examples 20, 21 and 23 are inserted.</p> <p>Examples 32 to 35 in the previous PR are amended and renumbered as Examples 24 to 27.</p>



	17	Example 36 in the previous PR is amended and renumbered as Example 28.
	18.1 (b)	Paragraph 14.2 in the previous PR has been amended and renumbered as paragraph 18.1(a).
	22	Paragraph 13.2 in the previous PR is amended and renumbered as paragraph 22.
	24	Paragraph 2 in the previous PR has been amended and renumbered as paragraph 24.

24. Disclaimer

The examples in this PR are for illustration purposes only and are not exhaustive.

**Director General of Inland Revenue,
Inland Revenue Board of Malaysia.**