



INLAND REVENUE BOARD MALAYSIA

FOREIGN NATIONALS WORKING IN MALAYSIA – TAX TREATMENT

PUBLIC RULING NO. 8/2011

Translation from the original Bahasa Malaysia text

DATE OF ISSUE: 16 NOVEMBER 2011



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DIRECTOR GENERAL'S PUBLIC RULING

A Public Ruling as provided for under section 138A of the Income Tax Act 1967 is issued for the purpose of providing guidance for the public and officers of the Inland Revenue Board Malaysia. 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.

A Public Ruling may be withdrawn, either wholly or in part, by notice of withdrawal or by publication of a new ruling which is inconsistent with it.

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

1. This Ruling explains the tax treatment of employment income derived by foreign nationals exercising employment in Malaysia.
2. The provisions of the Income Tax Act 1967 (ITA 1967) related to this Ruling are sections 2, 7, 13, 25, 132, 133, Schedules 6 and 7.
3. The words used in this Ruling have the following meaning:
 - 3.1 “Non-resident” for a basis year for a year of assessment in relation to an employee means an employee other than a resident employee.
 - 3.2 “Foreign tax” means any tax on income (or any other tax of a substantially similar character) chargeable or imposed under the laws of a territory outside Malaysia.
 - 3.3 “Malaysian tax” means tax imposed under the ITA 1967.
 - 3.4 “Seconded” means –
 - a) an employee is transferred temporarily by the employer to perform duties elsewhere; and
 - b) after the completion of his temporary duties the employee returns to the same employer to continue his employment.
 - 3.5 “Bilateral credit” means credit in respect of foreign tax which, by virtue of any arrangements has effect under section 132 of the ITA 1967, is to be allowed as a credit against Malaysian tax.
 - 3.6 “Unilateral credit” means credit in respect of foreign tax payable under the laws of a territory outside Malaysia with respect to which no arrangements under section 132 of the ITA 1967 are in force.
 - 3.7 “Employer” in relation to an employment, means –
 - (a) where the relationship of master and servant subsists, the master;
 - (b) where the relationship does not subsist, the person who pays or is responsible for paying any remuneration to the employee who has the employment, notwithstanding that that person and the employee may be the same person acting in different capacities.
 - 3.8 “Person” includes a company, a co-operative society, a club, an association, a Hindu Joint Family, a trust, an estate under administration, a partnership and an individual.
 - 3.9 “Employee” in relation to an employment, means –

(a) where the relationship of servant and master subsists;

(b) where the relationship does not subsist, the holder of the appointment or office which constitutes the employment.

3.10 “Resident of Malaysia” means resident in Malaysia for the basis year for a year of assessment by virtue of section 7 of the ITA 1967.

3.11 “Employment” means –

(a) employment in which the relationship of master and servant subsists;

(b) any appointment or office, whether public or not and whether or not that relationship subsists, for which remuneration is payable.

3.12 “Foreign income” means –

(a) income derived from outside Malaysia; or

(b) in the case of bilateral credit, “foreign income” includes income derived from Malaysia charged to foreign tax.

3.13 “Statutory income”, in relation to a person, a source and a year of assessment, means statutory income ascertained in accordance with the ITA 1967.

3.14 “Assessment” means any assessment or additional assessment made under the ITA 1967.

3.15 “Basis year” in relation to a year of assessment for an employment source is the basis period for that year of assessment.

3.16 “Year of assessment” means calendar year.

3.17 “Basis period” in relation to gross income from employment is ascertained by section 25 of the ITA 1967.

3.18 “Foreign national” means an individual who is a non-Malaysian citizen.

4. Tax Treatment Of Foreign Nationals Working In Malaysia

4.1. Employment income

Generally, income from employment is taxed in the country where the services are actually performed, irrespective of the place where the contract is entered into or where the remuneration is paid. In other words, a foreign

national working in Malaysia is liable to tax under Malaysian domestic law in respect of his employment income derived in Malaysia.

4.2. Employment income deemed derived from Malaysia

Subsection 13(2) of the ITA 1967 provides that employment income is deemed derived from Malaysia when employment is exercised in Malaysia. The phrase *exercising employment*, which is not defined in the ITA 1967 is generally understood to mean employment is exercised at the place where the employee is physically present when performing the activities for which the employment income is paid.

Gross income in respect of gains or profits from an employment is deemed derived from Malaysia under the following circumstances:

- a) Exercise employment - if the income arises for any period during which *the employment is exercised* in Malaysia pursuant to paragraph 13(2)(a) of the ITA 1967;

Example 1

Ahmad, a Brunei citizen, was employed as an auditor in an engineering company in Kuala Lumpur since 1.1.2010. His employment income is deemed derived from Malaysia because he has exercised his employment in Malaysia.

- b) Leave attributable to employment - if the income arises for any period *leave is attributable* to the exercise of the employment in Malaysia pursuant to paragraph 13(2)(b) of the ITA 1967;

Example 2

In Example 1 above, if Ahmad was on vacation leave (from 1.9.2010 to 15.9.2010) in Brunei visiting his family and friends, the period of leave is considered attributable to the exercise of his employment in Malaysia. Therefore the employment income for the duration of leave which was spent outside Malaysia is deemed derived from Malaysia.

- c) Duties incidental to employment - if the income arises for any period during which the employee performs outside Malaysia *duties incidental* to the exercise of the employment in Malaysia pursuant to paragraph 13(2)(c) of the ITA 1967.

(For further explanation, refer to Public Ruling No. 1/2011 entitled *Taxation of Malaysian Employees Seconded Overseas* which can be downloaded from Inland Revenue Board Malaysia's (IRBM) website at <http://www.hasil.gov.my>).

Example 3

In Example 1 above, if in the year 2010 Ahmad was sent by his employer in Malaysia to audit the accounts of a related company in Thailand, the employment income for the period he works in Thailand is deemed derived from Malaysia as the duties performed in Thailand are considered incidental to the exercise of his employment in Malaysia. In this case, the duties in Thailand are incidental to his Malaysian duties since there was no post for an auditor in Thailand and Ahmad was sent to do the job.

4.3. Basis of assessment of employment Income

The basis year for a year of assessment for employment income is the basis period for that year of assessment. Employment income is assessed on a current calendar year basis i.e. income for the basis period of 1.1.2010 to 31.12.2010 is assessed as year of assessment 2010.

4.4 Residence status in Malaysia

The residence status of an individual is determined by reference to the physical presence of that individual in Malaysia in a basis year for a year of assessment. In certain situations, the physical presence for the basis years preceding and basis years following a particular year of assessment has also to be taken into consideration.

Generally, an individual is a non-resident if his physical presence in Malaysia is less than 182 days in a basis year.

(For further explanation, refer to Public Ruling No. 6/2011 entitled *Residence Status of Individuals* which can be downloaded from IRBM's website).

4.5 Tax rates

The tax rates applicable to foreign nationals would depend on their residence status in Malaysia. Resident individuals are eligible to claim personal relief and are charged to tax at scale rates. Non-resident individuals, however, are not entitled to any personal relief. Non-resident individuals are subject to tax at the rate specified in Paragraph 1A, Part 1, Schedule 1 of the ITA 1967. For the years of assessment 2009 and 2010, the applicable rates are 27% and 26% respectively.

4.6 Short term employment in Malaysia

a) Period of employment not exceeding 60 days

The income of a non-resident individual from an employment exercised by him in Malaysia will be exempt from tax pursuant to paragraph 21, Schedule 6 of the ITA 1967 under the following circumstances:

- i) The employee exercised his employment in Malaysia for a period or periods which together do not exceed 60 days in a basis year for a year of assessment;

Example 4

Jordan, an American citizen employed by a multinational company in the United States of America (USA) was sent to work at its operational headquarters in Malaysia on a specific assignment. His employment in Malaysia was from 9.6.2010 to 30.6.2010 (22 days). Jordan went on a holiday touring the country for two weeks (14 days) before he left Malaysia.

The situation is summarized as follows:

Year 2010			
Works in USA	Works in Malaysia	Holiday in Malaysia	Works in USA
160 days	22 days	14 days	170 days



Exempted from tax
(not exceeding 60 days)

Jordan qualifies for tax exemption for the year of assessment 2010 as his period of employment in Malaysia does not exceed 60 days.

Example 5

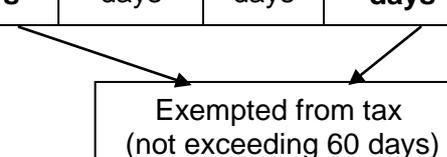
Same facts as in Example 4 except that Jordan returned to Malaysia to work from 1.9.2010 to 30.9.2010 (30 days) on another project as

instructed by his employer in the USA. His tax liability in Malaysia for the year of assessment 2010 will be reviewed from 1.1.2010.

The situation is summarized as follows:

Year 2010					
Works in USA	Works in M'sia	Holiday in M'sia	Works in USA	Works in Malaysia	Works in USA
160 days	22 days	14 days	62 days	30 days	78 days

Exempted from tax
(not exceeding 60 days)



Jordan still qualifies for tax exemption in the year of assessment 2010 as his period of employment in Malaysia does not exceed 60 days.

Example 6

James was sent by his employer to Malaysia to oversee the promotion of a new product at a related company from 1.4.2010 to 30.4.2010. When the related company in Malaysia experienced some problems later in the same year, James was sent to Malaysia again to monitor the situation from 1.9. 2010 to 15.11.2010.

When James's first employment period ceased in Malaysia (1.4.2010 to 30.4.2010), he was exempted from tax in the year of assessment 2010 as the employment period in Malaysia did not exceed 60 days. When James's second employment period ceased in Malaysia (1.9.2010 to 15.11.2010), his tax liability for the year of assessment 2010 was reviewed from 1.1.2010.

The situation is summarized as follows:

Year 2010				
Works in USA	Works in Malaysia	Works in USA	Works in Malaysia	Works in USA
91 days	30 days	123 days	76 days	46 days



Not exempted from tax
(exceeded 60 days)

James does not qualify for tax exemption in the year of assessment 2010 as his period of employment in Malaysia exceeds 60 days.

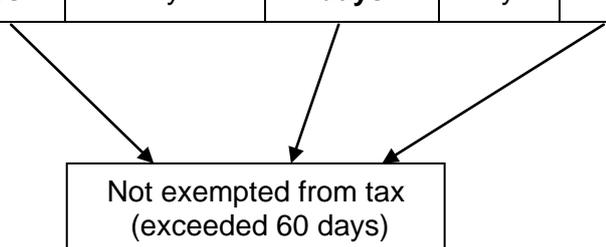
Example 7

The facts are the same as in Example 6 except that James resigned from the company upon returning to the USA on 16.11.2010. He immediately joined a rival company in the USA which sent him to Malaysia to oversee the expansion of a branch office from 1.12.2010 to 31.12.2010.

At the time when James's third employment period ceased (1.12.2010 to 31.12.2010), his tax liability in Malaysia for the year of assessment 2010 was reviewed from 1.1.2010.

The situation is summarized as follows:

Year 2010					
Works in USA	Works in M'sia	Works in USA	Works in M'sia	Works in USA	Works in M'sia
91 days	30 days	123 days	76 days	15 days	30 days



Not exempted from tax
(exceeded 60 days)

James does not qualify for tax exemption in the year of assessment 2010 as his period of employment (although with different employers) in Malaysia exceeds 60 days.

- ii) The employee exercised his employment in Malaysia for a continuous period (not exceeding 60 days) which overlaps the basis years for two successive years of assessment;

Example 8

Blair is a process / operations technology engineer with an oil & gas company in the USA. He was sent to Malaysia for the period from 16.12.2009 to 15.1.2010 (31days) by his employer to conduct feasibility studies for plant improvement to ensure a flexible and economical operation at a subsidiary in Malaysia.

The situation is summarized as follows:

Year 2009		Year 2010	
Works in USA	Works in Malaysia	Works in USA	
349 days	31 days	351 days	

↓
Exempted from tax
(not exceeding 60 days)

Blair qualifies for tax exemption for the years of assessment 2009 and 2010 as his employment in Malaysia is for a continuous period not exceeding 60 days (i.e. 31 days) which overlaps two successive years of assessment.

- iii) The employee exercised his employment in Malaysia for a continuous period (not exceeding 60 days) which overlaps the basis years for two successive years of assessment and for a period or periods which together with that continuous period do not exceed 60 days.

Example 9

In Example 8, if Blair returned to Malaysia from 1.3.2010 to 15.3.2010 (15 days) to oversee the implementation of his recommendations on plant improvement, his tax liability will be reviewed from 16.12.2009.

The situation is summarized as follows:

Year 2009		Year 2010		
Works in USA	Works in M'sia	Works in USA	Works in M'sia	Works in USA
349 days	31 days	45 days	15 days	291 days

Exempted from tax
(not exceeding 60 days)

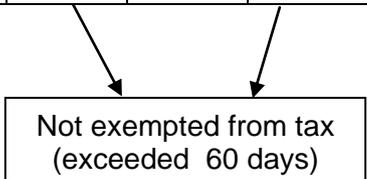
Blair still qualifies for tax exemption for the years of assessment 2009 and 2010 as his employment in Malaysia for a continuous period not exceeding 60 days (i.e. 31 days) overlapped two successive years of assessment and the period of 15 days which together with that continuous period does not exceed 60 days (i.e. 46 days).

Example 10

In Example 9, if Blair returned to Malaysia from 1.3.2010 to 30.4.2010 (61 days) to oversee the implementation of his recommendations on plant improvement, his tax liability will be reviewed from 16.12.2009.

The situation is summarized as follows:

Year 2009		Year 2010		
Works in USA	Works in M'sia	Works in USA	Works in M'sia	Works in USA
349 days	31 days	45 days	61 days	245 days



Not exempted from tax
(exceeded 60 days)

Blair's employment in Malaysia is for a continuous period of less than 60 days (31 days). However, this period overlaps two successive years of assessment and another period of 61 days together with this continuous period (31 days) exceeds 60 days (92 days). Hence Blair does not qualify for tax exemption for the years of assessment 2009 and 2010.

b) Period of employment exceeding 60 days

The exemption will not apply where an individual has income derived from Malaysia from that employment:

- (i) for a period or periods amounting in all to more than sixty days in the basis year; or

- (ii) is in Malaysia for a continuous period exceeding 60 days which overlaps over two successive basis periods; or
- (iii) where the continuous overlapping period together with some other period or periods exceeds 60 days.
[Paragraph 22(a), Schedule 6 of the ITA 1967].

Example 11

George, from the USA was employed in Malaysia as follows:

1.9.2010 to 30.9.2010	30 days
1.10.2010 to 31.10.2010	<u>31 days</u>
Total	<u>61 days</u>

George was paid remuneration for the period 1.9.2010 to 31.10.2010 (61 days). He left Malaysia on the night of 29.10.2010 since the weekend on 30.10.2010 and 31.10.2010 were non-working days. He was physically present in Malaysia for only 59 days.

George's remuneration for the period of employment (61 days) will be subject to tax at the tax rate for non-resident individuals as paragraph 22, Schedule 6 of the ITA 1967 is applicable.

Observation

Unlike in the determination of residence status in Malaysia the exemption period of 60 days refers to the period of employment in Malaysia and not to the physical presence of the employee in Malaysia.

Example 12

In Example 11, if George exercised his employment in Malaysia for 40 days and was required to perform certain duties (incidental to his duties in Malaysia) in Thailand and Indonesia which totals 21 days, his period of employment is therefore 61 days. His tax liability will be reviewed from 1.1.2010.

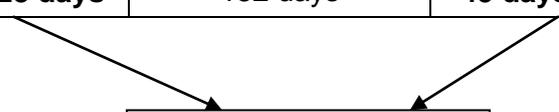
George is deemed to have derived his remuneration relating to his duties performed in Thailand and Indonesia from Malaysia pursuant to paragraph 13(2)(c) of the ITA 1967. George is taxable in Malaysia on his employment income.

Example 13

Angelina from the USA was employed by Company X in Malaysia from 1.2.2010 to 28.2.2010 (28 days). She left Malaysia on 28.2.2010. She returned to Malaysia on 31.7.2010 as she had obtained an employment with Company Y from 1.8.2010 to 14.9.2010 (45 days).

The situation is summarized as follows:

Year 2010				
Works in USA	Works in Malaysia	Works in USA	Works in Malaysia	Works in USA
31 days	28 days	152 days	45 days	92 days



Not exempted from tax
(exceeded 60 days)

The period of employment with Company X is for a period not exceeding 60 days. Therefore Angelina is exempted from tax at the time she left Malaysia on 28.2.2010. Her subsequent employment with Company Y is for 45 days. Therefore the periods of employment in the basis year 2010 is 73 days (28 days + 45 days). As Angelina's total employment period in Malaysia exceeds 60 days in 2010, she is not eligible for tax exemption on the employment income from Company X and Company Y.

5. Tax Treatment Of Foreign Nationals From Treaty Countries Seconded To Malaysia

5.1 Double taxation

When a foreign national derives employment income from Malaysia but is a resident of another country, income tax may be payable in both Malaysia and the country of residence.

5.2 Double Taxation Avoidance Agreement

The Malaysian Government has entered into Agreements for the Avoidance of Double Taxation (DTA) with a number of other countries in order to eliminate instances of double taxation should the same income be subject to tax in more than one country. This depends on the provisions of the DTA.

5.3 Employment Article / Dependent Personal Services Article in the DTA

For foreign nationals exercising employment in Malaysia, the Dependent Personal Services (DPS) Article of the relevant Malaysian DTA or tax treaty is applicable for tax treaty relief. However, the precise terms of the DPS Article in each DTA may vary from country to country. The full text of the relevant Malaysian DTAs are available on IRBM's website.

6. **Bilateral Credit**

Bilateral credit is allowed against Malaysian tax only to a person who is charged to Malaysian tax for a year of assessment and who is resident for the basis year for that year of assessment.

If employment income is taxed in both Malaysia and also in the country overseas and if there is a tax treaty between the two countries concerned, the Malaysian tax law provides for a relief in the form of a bilateral credit under section 132 of the ITA 1967. The formula for the computation of this credit is as follows:

$$\frac{\text{Foreign income (statutory income)}}{\text{Total income}} \times \text{Malaysian tax payable before bilateral/unilateral credit}$$

Or

Foreign tax charged in respect of the foreign¹ income charged to tax twice, whichever is lower.

(¹With effect from the year of assessment 2007, foreign income for the purposes of claiming bilateral credit includes income derived from Malaysia and charged to foreign tax)

7. **Tax Treatment Of Foreign Nationals From Non-Treaty Countries Seconded To Malaysia**

In the absence of a tax treaty, the domestic tax laws of both Malaysia and the relevant foreign country remain applicable.

Example 14

Gates, an engineering consultant, was sent by his employer in the United States of America (USA) to assist in a project carried out by a subsidiary company in Malaysia from 1.6.2010 to 31.8.2010 (92 days). Gates's remuneration was paid and borne by his employer in the USA during his secondment to Malaysia. *As Gates's employment period exceeds 60 days in the year 2010, his employment income in Malaysia is subject to tax in Malaysia. Gates is taxed based on the domestic tax laws of Malaysia as there is no DTA between Malaysia and USA on employment income.*

Observation

Pursuant to paragraph 15 of Schedule 7 of the ITA 1967, unilateral credit may be allowed for foreign tax if an employee pays Malaysian tax and foreign tax in respect of income from an employment exercised outside Malaysia, whether or not he was resident in the basis year for the year of assessment for which the Malaysian tax was paid.

In this case, Gates is not eligible to claim unilateral credit relief in Malaysia should his employment income for the period from 1.6.2010 to 31.8.2010 be taxed in the USA also as he did not exercise his employment outside Malaysia but was sent by his employer in the USA to work in Malaysia.

8. Tax Treatment Of Foreign Nationals Participating In The Malaysian Technical Co-operation Programme

With effect from the year of assessment 2007 an individual who is not a Malaysian citizen and not a resident in Malaysia is exempt from tax on the payment he receives from participating in the Malaysian Technical Co-operation Programme [P.U.(A) 18 Income Tax (Exemption) Order 2008].

9. Filing Of Income Tax Return Forms

Foreign nationals who are non-residents in Malaysia are required to file an Income Tax Form i.e. Form M for the respective year of assessment. If they qualify as a resident in Malaysia for the relevant year of assessment, a Form BE or Form B (whichever is applicable) should be filed. The due date of submission of the Income Tax Form is on/before 30th April in the following year.

10. Effective Date

This Ruling is effective for the year of assessment 2011 and subsequent years of assessment.

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



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