

A BILL

*i n t i t u l e d*

An Act to amend the Labuan Business Activity Tax Act 1990.

[ ]

**ENACTED** by the Parliament of Malaysia as follows:

**Short title and commencement**

**1.** (1) This Act may be cited as the Labuan Business Activity Tax (Amendment) Act 2019.

(2) Paragraph 2(*a*) and sections 3, 4, 5, 6, 7, 9, 10, 11, 12 and 14 have effect for the year of assessment 2020 and subsequent years of assessment.

(3) Paragraph 2(*b*) and sections 13 and 15 come into operation on the coming into operation of this Act.

(4) Section 8 is deemed to have come into operation on 1 January 2019.

**Amendment of section 2**

2. The Labuan Business Activity Tax Act 1990 [Act 445] which is referred to as the “principal Act” in this Act, is amended in subsection 2(1)—

(a) by deleting the definition of “resident”; and

(b) by inserting after the definition of “shipping operations” the following definition:

“Special Commissioners” means the Special Commissioners of Income Tax appointed under section 98 of the Income Tax Act 1967;”.

**Amendment of section 2B**

3. Section 2B of the principal Act is amended by inserting after subsection (1) the following subsection:

“(1A) A Labuan entity carrying on a Labuan business activity which fails to comply with regulations made under subsection (1) for a basis period for a year of assessment shall be charged to tax at the rate of twenty four per cent upon its chargeable profits for that year of assessment.”.

**New section 3B**

4. The principal Act is amended by inserting after section 3A the following section:

**“Residence**

**3B.** For the purposes of the double taxation arrangements effected under section 132 of the Income Tax Act 1967—

(a) a Labuan entity carrying on a business or businesses is resident in Malaysia for the basis year for a year of assessment if at any time during that basis year the management and control of its business or of any one of its businesses, as the case may be, are exercised in Malaysia; and

- (b) any other Labuan entity is resident in Malaysia for the basis year for a year of assessment if at any time during that basis year the management and control of its affairs are exercised in Malaysia by its directors, partners, trustees or other controlling authority.”.

#### **Amendment of section 4**

5. Subsection 4(2) of the principal Act is amended by substituting for the words “The chargeable profits” the words “Subject to this Act, the chargeable profits”.

#### **Amendment of section 6**

6. Section 6 of the principal Act is amended—

- (a) in the shoulder note, by inserting after the word “**Assessment**” the words “**and additional assessment**”;
- (b) by renumbering the existing section as subsection (1);
- (c) in the renumbered subsection (1)—
- (i) by substituting for the words “in the prescribed form” the words “in accordance with section 6A”;
  - (ii) by deleting the words “, personally or by post,”; and
  - (iii) by inserting after the words “the Labuan entity concerned” the words “in accordance with section 6B”; and
- (d) by inserting after the renumbered subsection (1) the following subsections:

“(2) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount

or additional amount of chargeable profit and tax or in the additional amount of tax, in which according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

(3) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax in consequence of the Director General's determination pursuant to subsection 17D(3), may in that year or within seven years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable profit and tax or in the additional amount of tax, in which according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

(4) The Director General where it appears to him that—

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.”.

#### **New sections 6A, 6B, 6C and 6D**

7. The principal Act is amended by inserting after section 6 the following sections:

##### **“Form and making of assessments**

**6A.** (1) An assessment made under section 6 shall—

(a) be made in the appropriate prescribed form;

- (b) indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable profits and the tax charged thereon or the amount of tax or additional tax, as the case may be; and
- (c) specify in the appropriate space in that form the date on which that form was duly completed.

(2) Where the form under subsection (1) appears to have been duly completed, the assessment shall, until the contrary is proved, be presumed to have been made on the date so specified.

### **Notice of assessment**

**6B.** (1) As soon as may be after an assessment has been made under section 6, the Director General shall cause a notice of assessment to be served, personally or by post on the chargeable Labuan entity in respect of whom the assessment was made.

(2) Where the tax charged under an assessment is increased on appeal to the Special Commissioners or a court, then, as soon as may be after the appeal has been decided there shall be served, personally or by post on the chargeable Labuan entity in respect of whom the assessment was made a notice of increased assessment.

(3) A notice served under subsection (1) or (2) shall indicate, in addition to any other material included therein—

- (a) in the case of a notice served under subsection (1), the year of assessment and the amount or additional amount of the chargeable profits and the tax charged;
- (b) in the case of a notice served under subsection (2), the year of assessment and the amount of the increase in the tax charged; and
- (c) in either case—
  - (i) the place at which payment is to be made;

- (ii) the increase for late payment imposed by subsection 13A(2); and
- (iii) any right of appeal which may exist under this Act.

### **Finality of assessment**

**6c.** (1) The assessment made, agreed to or determined, shall be final and conclusive for the purposes of this Act, where—

- (a) no valid notice of appeal against an assessment has been given under section 99 of the Income Tax Act 1967 within the time specified by that section or any extension of time granted;
- (b) an agreement has been come to with respect to an assessment pursuant to subsection 101(2) of the Income Tax Act 1967; or
- (c) an assessment has been determined on appeal and there is no right of further appeal.

(2) Nothing in subsection (1) shall prejudice the exercise of any power conferred on the Director General by section 6.

### **Right of appeal**

**6d.** (1) A person aggrieved by an assessment made on him may appeal to the Special Commissioners against the assessment in the same manner as an appeal against an assessment of income tax made under the Income Tax Act 1967, and sections 99, 100, 101 and 102 of the Income Tax Act 1967, as far as they are applicable and with the necessary modifications, shall apply to an appeal against an assessment made under this Act as if—

- (a) every reference in those sections to income tax or to tax were a reference to Labuan business activity tax; and

(b) every reference in those sections to income were a reference to chargeable profits.

(2) Schedule 5 to the Income Tax Act 1967 shall apply with necessary modifications in relation to the procedures of hearing of appeals to the Special Commissioners and to the procedures of hearing of further appeals.”.

### **Amendment of section 9**

**8.** Section 9 of the principal Act is amended—

(a) by renumbering the existing section as subsection (1);

(b) in the renumbered subsection (1)—

(i) by inserting after the words “Notwithstanding section 3,” the words “the profit of”; and

(ii) by inserting after the words “be charged to tax” the words “under this Act”; and

(c) by inserting after the renumbered subsection (1) the following subsections:

“(2) For the avoidance of doubt, the profit of a Labuan entity carrying on a Labuan business activity which is a Labuan non-trading activity referred to in subsection (1) shall not include any income derived from royalty and other income derived from an intellectual property right if it is receivable as consideration for the commercial exploitation of that right.

(3) Any income derived from intellectual property right referred to in subsection (2) is subject to tax under the Income Tax Act 1967.

(4) In this section, “intellectual property right” has the same meaning assigned to it under subsection 4(5).”.

**New section 13A**

9. The principal Act is amended by inserting after section 13 the following section:

**“Tax due and payable**

13A. (1) Where an assessment is made under section 6, the tax payable under the assessment shall, on the service of the notice of assessment under section 6B, be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment.

(2) Where any tax due and payable under subsection (1) has not been paid within thirty days after the service of the notice, so much of the tax as is unpaid upon the expiration of that period shall without any further notice being served be increased by a sum equal to ten per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.”.

**New sections 17c and 17D**

10. The principal Act is amended by inserting after section 17B the following sections:

**“Power to disregard certain transactions**

17C. (1) The Director General may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit, including the computation or re-computation of the chargeable profit, or the imposition of liability to tax, or make such assessment or additional assessment in respect of any person as may be necessary in consequence of his exercise of the powers, with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction, where he has reason to believe that any transaction has the direct or indirect effect of—

- (a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable by any person or suffered by any person;



- (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
- (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
- (d) hindering or preventing the operation of this Act in any respect.

(2) In exercising his powers under this section, the Director General may require by notice any person to pay to him within the time specified in the notice the amount of tax that would be deducted by that person under this Act in consequence of his exercise of those powers.

(3) Without prejudice to the generality of subsections (1) and (2), the powers of the Director General conferred by this section shall extend—

- (a) to the charging with tax of any person or persons who if not for any adjustment made by virtue of this section would not be chargeable with tax or would not be chargeable with tax to the same extent; and
- (b) to the charging of a greater amount of tax than would be chargeable if not for any such adjustment.

(4) Where in consequence of any adjustment made under this section an assessment is made, a right to repayment is refused or a return of a repayment of tax is required, the particulars of the adjustment shall be given with the notice of assessment, with the notice refusing the repayment or with the notice requiring the return of a repayment, as the case may be.

(5) Transactions—

- (a) between persons one of whom has control over the other; or
- (b) between persons both of whom are controlled by some other person,

shall be deemed to be transactions of the kind to which subsection (1) applies if in the opinion of the Director General those transactions have not been made on terms which might fairly be expected to have been made by independent persons engaged in the same or similar activities dealing with one another at arm's length.

(6) For the purposes of this section—

- (a) a person shall be taken to have control over the other in the same manner as provided under section 139 of the Income Tax Act 1967 as far as it is applicable and with the necessary modifications; and
- (b) “transaction” means any trust, grant, covenant, agreement, arrangement or other disposition or transaction made or entered into orally or in writing, whether before or after the commencement of this Act, and includes a transaction entered into by two or more persons with another person or persons.

### **Power to substitute the price on certain transactions**

**17D.** (1) This section shall apply notwithstanding section 17C and subject to any regulations prescribed under this Act.

(2) Subject to subsection (3), where a person in the basis period for a year of assessment enters into a transaction with an associated person for that year for the acquisition or supply of property or services, then, for all purposes of this Act, that person shall determine and apply the arm's length price for such acquisition or supply.

(3) Where the Director General has reason to believe that any property or services referred to in subsection (2) is acquired or supplied at a price which is either less than or greater than the price which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length, the Director General may in determination of the chargeable profit of the person, substitute the price in respect of the transaction to reflect an arm's length price for the transaction.

(4) The transactions referred to in subsection (2) shall be construed as a transaction between—

- (a) persons one of whom has control over the other; or
- (b) persons both of whom are controlled by some other person, in this section referred to as “third person”.

(5) Without prejudice to the generality of paragraph 17C(6)(a), for the purpose of subsection (4), “control” refers to persons one of whom owns shares of the other person, or a third person who owns shares of both persons, where the percentage of the share capital held in either situation is twenty per cent or more and—

- (a) the business operations of that person depends on the proprietary rights, such as patents, non-patented technological know-how, trademarks or copyrights, provided by the other person or a third person;
- (b) the business activities, such as purchases, sales, receipt of services, provision of services, of that person are specified by the other person, and the prices and other conditions relating to the supply are influenced by such other person or a third person; or
- (c) where one or more of the directors or members of the board of directors of a person are appointed by the other person or a third person.

(6) In this section, “transaction” has the same meaning assigned to it under paragraph 17C(6)(b).”.

**New sections 22B, 22C, 22D, 22E and 22F**

**11.** The principal Act is amended by inserting after section 22A the following sections:

**“Power to call for specific returns and production of books**

**22B.** For the purpose of obtaining full information for ascertaining whether or not a person is chargeable to tax or

for determining his liability, the Director General may by notice in writing require that or any other person—

- (a) to complete and deliver to the Director General within a time specified in the notice, not being less than thirty days from the date of service of the notice, any return specified in the notice;
- (b) to attend personally before the Director General and produce for examination all books, accounts, returns and other documents which the Director General deems necessary;
- (c) to make a return in accordance with paragraph (a) and also to attend in accordance with paragraph (b); or
- (d) to provide in writing such information or particulars which the Director General deems necessary.

**Power to call for statement of bank accounts, etc.**

**22c.** The Director General may by notice in writing require any person to furnish within a time specified in the notice, not being less than thirty days from the date of service of the notice, a statement containing particulars of—

- (a) all banking accounts, being accounts which are in existence or have been in existence at any time during a period to be specified in the notice,—
  - (i) in his own name or in the name of a wife or dependent child of his or jointly in any such names;
  - (ii) in which he is or has been interested jointly or solely; or
  - (iii) on which he has or has had power to operate jointly or solely;

- (b) all savings and loan accounts, deposits, building society accounts and co-operative society accounts in regard to which he has or has had any interest or power to operate jointly or solely during that period;
- (c) all assets which he and any wife or dependent child of his possess or have possessed during that period;
- (d) all sources of his and the gross income from those sources; and
- (e) all facts bearing upon his present or past chargeability to tax.

**Power to access buildings and documents, etc.**

**22D.** (1) For the purposes of this Act, the Director General shall at all times have full and free access to all lands, buildings and places and to all books, documents, objects, articles, materials and things and may search such lands, buildings and places and may inspect, copy or make extracts from any such books, documents, objects, articles, materials and things without making any payment by way of fee or reward.

(2) Where the Director General exercises his powers under subsection (1), the occupiers of such lands, buildings and places shall provide the Director General or an authorized officer with all reasonable facilities and assistance for the exercise of his powers under this section.

(3) The Director General may take possession of any books, documents, objects, articles, materials and things to which he has access under subsection (1) where in his opinion—

- (a) the inspection of them, the copying of them or the making of extracts from them cannot reasonably be undertaken without taking possession of them;
- (b) they may be interfered with or destroyed unless he takes possession of them; or

(c) they may be needed as evidence in any legal proceedings instituted under or in connection with this Act.

(4) A list of all things seized in the course of a search made under this section and of the places in which they are respectively found shall be prepared by the officer making the search and signed by him.

(5) Where in the opinion of the Director General it is necessary for the purpose of ascertaining the chargeable profit from a business for any period to examine any books, accounts or records kept otherwise than in the national language or English, he may by notice in writing require any person carrying on the business during that period to furnish within a time specified in the notice, not being less than thirty days from the date of service of the notice, a translation in the national language or English of the books, accounts or records in question.

### **Duty to keep documents for ascertaining chargeable profit and tax payable**

**22E.** (1) Every person who is required to furnish a return of his profits for a year of assessment under this Act shall keep and retain in safe custody sufficient documents for a period of seven years from the end of that year of assessment for the purposes of ascertaining his chargeable profit and tax payable.

(2) Where a person referred to in subsection (1) has not furnished a return as required under this Act for a year of assessment, that person shall keep and retain the documents referred to in subsection (1) that relate to that year of assessment for a period of seven years after the end of the year in which the return is furnished.

(3) The Director General may waive all or any of the requirements under subsection (1) in respect of any profit.

(4) Any person who is required by this section to keep documents and—

(a) does so electronically, shall retain them in an electronically readable form and shall keep the documents in such a manner as to enable the documents to be readily accessible and convertible into writing; or

(b) has originally kept documents in a manual form and subsequently converts those documents into an electronic form, shall retain those documents prior to the conversion in their original form.

(5) All documents that relate to any profit in Malaysia shall be kept and retained in Malaysia.

(6) For the purposes of this section, “documents” means—

(a) statement of profits; and

(b) invoices, vouchers, receipts and such other documents as are necessary to verify the particulars in a return.

### **Prosecution**

**22F.** No prosecution for an offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor.”.

### **Amendment of section 23**

**12.** Section 23 of the principal Act is amended—

(a) by deleting the words “without reasonable excuse”;

(b) by deleting the word “or” at the end of paragraph (a);

(c) by substituting for the comma at the end of paragraph (b) the words “; or”; and

(d) by inserting after paragraph (b) the following paragraph:

“(c) fails to comply with a notice given under sections 22B, 22C or subsection 22D(5).”.

### **Substitution of section 24**

**13.** The principal Act is amended by substituting for section 24 the following section:

#### **“Compounding of offences**

**24.** (1) The Director General may, with the consent in writing of the Public Prosecutor, at any time before a charge is being instituted, compound any offence committed by any person under section 22 or 23 by making a written offer to the person reasonably suspected of having committed the offence to compound the offence upon payment to the Director General of a sum of money not exceeding fifty per centum of the amount of the maximum fine to which the person would have been liable to if he had been convicted of the offence, within such time as may be specified in the written offer.

(2) An offer under subsection (1) may be made at any time after the offence has been committed but before any prosecution for it has been instituted, and where the amount specified in the offer is not paid within the time specified in the offer, or such extended time as the Director General may grant, prosecution for the offence may be instituted at any time after that against the person to whom the offer was made.

(3) Where an offence has been compounded under subsection (1), no prosecution shall be instituted in respect of the offence against the person to whom the offer to compound was made, and any document or thing seized in connection with the offence may be released by the Director General, subject to such terms as the Director General thinks fit.

(4) All sums of money received by the Director General under this section shall be paid into and form part of the Consolidated Fund.”.



## **Amendment of section 27**

**14.** Section 27 of the principal Act is amended by inserting after the words “other than” the words “a notice of assessment issued under section 6 or”.

## **Savings**

**15.** Any compounding of offences under the existing section 24 of the principal Act which is pending immediately before the date of coming into operation of this Act shall, on or after the coming into operation of this Act, continue to be valid and shall be dealt with under section 24 of the principal Act as if section 24 had not been amended by this Act.

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## EXPLANATORY STATEMENT

This Bill seeks to amend the Labuan Business Activity Tax Act 1990 (“Act 445”). The main purpose of these amendments is to improve the administration of tax in relation to tax assessment made on chargeable profits of a Labuan entity in order to comply with international requirements.

2. *Clause 1* contains the short title and the commencement of the proposed Act.

3. *Clause 2* seeks to amend section 2 of Act 445.

*Subclause 2(a)* seeks to delete the definition of “resident” to provide that a Labuan entity is allowed to transact with a resident.

*Subclause 2(b)* seeks to introduce the definition of “Special Commissioners”.

4. *Clause 3* seeks to amend section 2B of Act 445 to provide that a Labuan entity carrying on a Labuan business activity is to be charged at the rate of twenty four per cent upon its chargeable profits if it fails to comply with the regulations referred to in subsection 2B(1).

5. *Clause 4* seeks to introduce a new section 3B into Act 445 to provide on how to determine the residence status of Labuan entities for the purpose of a double taxation agreement under section 132 of the Income Tax Act 1967.

6. *Clause 5* seeks to amend section 4 of Act 445 to provide that, after the coming into operation of this Act, the chargeable profits of a Labuan entity carrying on a Labuan business activity which is a Labuan trading activity will also be subjected to the other provisions of Act 445, relating to the power of the Director General to conduct an audit and investigation and to make an additional assessment.

7. *Clause 6* seeks to amend section 6 of Act 445 to provide that the Director General may make an additional assessment when it appears to him that no or no sufficient assessment has been made on a person chargeable to tax.

8. *Clause 7* seeks to introduce new sections 6A, 6B, 6C and 6D into Act 445.

The proposed section 6A deals with form of making assessments.

The proposed section 6B deals with notice of assessments and the service of the notice on the chargeable Labuan entity.

The proposed section 6C seeks to provide the circumstances in which an assessment becomes final and conclusive.

The proposed section 6D seeks to provide that a person aggrieved by an assessment made may appeal to the Special Commissioner in the same manner as an appeal against an assessment of income tax under the Income Tax Act 1967. This *clause* also seeks to provide that Schedule 5 to the Income Tax Act 1967 in relation to appeal and its procedures shall be applicable to an appeal or further appeal made under Act 445.

9. *Clause 8* seeks to amend section 9 of Act 445 to clarify that the profit of a Labuan entity carrying on a Labuan business activity which is a Labuan non-trading activity that is not chargeable to tax under Act 445 does not include income derived from intellectual property right, and that any income derived from intellectual property right is subject to tax under the Income Tax Act 1967.

10. *Clause 9* seeks to introduce a new section 13A into Act 445 to provide that the tax payable in consequence to an assessment made under section 6 of Act 445 is due and payable when the notice of assessment is served on the person and if the tax is not paid within thirty days after the service of the notice, the tax unpaid will be increased by ten per cent and that sum shall be recoverable as tax due and payable under Act 445.

11. *Clause 10* seeks to introduce new sections 17C and 17D into Act 445.

The proposed section 17C seeks to provide power to the Director General to disregard and make adjustments in relation to certain transactions that has the direct or indirect effect of altering the incidence of tax, relieving any person from any liability to pay tax, evading or avoiding any duty or liability which is imposed or would otherwise have been imposed or hindering or preventing the operation of this Act.

The proposed section 17D seeks to provide for a special provision relating to a transaction between related parties in particular on the matter pertaining to the determination of transfer pricing. With the amendment, the Director General may substitute the price in a related transaction if the transaction was not made at arm's length.

12. *Clause 11* seeks to introduce new sections 22B, 22C, 22D, 22E and 22F into Act 445.

The proposed section 22B seeks to provide power to the Director General to call for specific returns and production of books by notice in writing.

The proposed section 22C seeks to provide power to the Director General to call for statement of bank accounts or other documents by notice in writing.

The proposed section 22D seeks to provide power to the Director General to have access and to search all lands, buildings and places including the power to inspect and take possession of any books, documents, objects, articles, materials and things to which he has access to and the officer making the search shall prepare the search list of all things seized and respectively found.

The proposed section 22E seeks to require that every person who is required to furnish a return of his profits must keep records for a period of seven years from the end of the year of assessment for the purposes of ascertaining his chargeable profit and tax payable.

The proposed section 22F seeks to provide that no prosecution for an offence shall be instituted except by or with written consent of the Public Prosecutor.

13. *Clause 12* seeks to amend section 23 to provide that failure to comply with notice given under the new sections 22B, 22C or subsection 22D(5) constitutes an offence punishable under this section.

14. *Clause 13* seeks to amend section 24 of Act 445 to provide that the Director General may compound the offence committed under section 22 or 23 with the written consent of the Public Prosecutor.

15. *Clause 15* seeks to provide the saving provision for compounding of offences prior to the coming into operation of the amendment to section 24 of Act 445.

16. Other amendments not specifically dealt with in this Statement are minor or consequential in nature.

*FINANCIAL IMPLICATIONS*

This Bill will not involve the Government in any extra financial expenditure.

[PN(U2)3198]