

Tax Regime in Labuan

1. Labuan entities are given the option to elect to be taxed under the local Income Tax Act, 1967 ("ITA") or under the existing preferential tax regime of Labuan Business Activity Tax Act, 1990 ("LBATA").
2. Labuan entities electing to pay tax under the ITA (such election shall be irrevocable) as provided for under Section 3A of LBATA are taxed at the prevailing local tax rate (currently at 24%) and governed by all the provisions of the ITA.
3. Although the election to pay tax under ITA will subject the Labuan entities to 24% tax, with proper application of the relevant exemption provisions there creates a situation whereby the **dividend income** of the Labuan entities and the **dividend received** from LE are not subject to any tax in Malaysia if not remitted to Malaysia.
4. Malaysia (including Labuan) is a member of the Global Forum on Transparency and Exchange of Information for Tax of Economic Cooperation and Development ("OECD"). This membership means Malaysia (including Labuan), has met with the criteria set by the OECD that allow for the exchange of information for tax purposes in accordance with Article 26 of OECD's Model Tax Convention.
5. Action 5 of the "Inclusive Framework on Base Erosion and Profit Shifting" issued by OECD consists of two parts. One part relates to preferential tax regimes, where a peer review is undertaken to identify features of such regimes that can facilitate base erosion and profit shifting, and therefore have the potential to unfairly impact the tax base of other jurisdictions. The second part includes a commitment to transparency through the compulsory spontaneous exchange of relevant information (Country by Country Reporting and Common Reporting Standard) on taxpayer-specific rulings which, in the absence of such information exchange, could give rise to Base Erosion and Profit Shifting ("BEPS") concerns.
6. Malaysia is a signatory to the Inclusive Framework. Signatory jurisdictions will have to implement and support the review of the four BEPS minimum standards, on harmful tax practices, tackling tax treaty abuse, country-by-country (CbC) reporting, and improvements to cross-border tax dispute resolution mechanisms. Therefore compliance with the Substance Regulations would mean compliance with the requirements of Action 5 of the Inclusive Framework.
7. A Labuan entity has to ensure that it is a Labuan entity as defined under Section 2B of LBATA in order to enjoy the tax rate of 3% on chargeable audited net profit. To qualify the entity shall, for the purpose of the Labuan business activity, have:
 - (A) In relation to a Labuan trading activity:
 - (i) Minimum number of full-time employees in Labuan;
 - (ii) Minimum amount of annual operating expenditure in Labuan, and
 - (iii) Any condition in relation to a fit and proper person for full-time employees.
 - (B) In relation to a Labuan non-trading activity:
 - (i) Minimum number of full-time employees in Labuan;
 - (ii) Minimum amount of annual operating expenditure in Labuan;

- (iii) Comply with any condition in relation to control and management in Labuan; and
- (iv) Comply with any condition in relation to a fit and proper person for full-time employees.

as prescribed by the Minister by regulations made under Section 21 of LABATA.

8. The following entities are considered as Labuan entities:

- (a) A Labuan company;
- (b) A Labuan foundation established and registered under the Labuan Foundations Act 2010;
- (c) A Labuan Islamic foundation established and registered under the Labuan Islamic Financial Services and Securities Act 2010;
- (d) A Labuan Islamic partnership as defined in the Labuan Islamic Financial Services and Securities Act 2010;
- (e) A Labuan limited partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010;
- (f) A Labuan limited liability partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010;
- (g) A Labuan Islamic trust as defined in the Labuan Islamic Financial Services and Securities Act 2010;
- (h) A Labuan trust as defined in the Labuan Trusts Act 1996;
- (i) A Malaysian Islamic bank licensee as defined in the Labuan Islamic Financial Services and Securities Act 2010;
- (j). A Malaysian bank licensee as defined in the Labuan Financial Services and Securities Act 2010;
- (k). Any Labuan financial institutions as defined in the Labuan Financial Services Authority Act 1996;
- (l). Any person declared by the Minister to be a Labuan entity under subsection 2B(2);

9. **Under Schedule 1 of the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 ("Substance Regulations 2021") [APPENDIX 1] which was gazetted on 19 November 2021 and will be applicable as from 19 November 2021 onwards a Labuan entity carrying on a **Labuan trading activity** shall have the number of fit and proper full-time employees and an amount of annual operating expenditure as follows:**

(1) No.	(2) Labuan entity carrying on a Labuan trading activity	(3) Minimum number of full time employees in Labuan	(4) Minimum amount of annual operating expenditure in Labuan (RM)
1.	Labuan insurer, Labuan reinsurer, Labuan takaful operator or Labuan retakaful operator	3	200,000
2.	Labuan underwriting manager or Labuan underwriting takaful manager	4	100,000
3.	Labuan insurance manager or Labuan takaful manager	4	100,000
4.	Labuan insurance broker or Labuan takaful broker	2	100,000
5.	Labuan captive insurer or Labuan captive takaful –		
	(a) Labuan first party captive insurer or Labuan first party captive takaful; or	2	100,000
	(b) Labuan third party captive insurer or Labuan third party captive takaful.	3	100,000
6.	Labuan bank, Labuan investment bank, Labuan Islamic bank or Labuan Islamic investment bank	3	200,000
7.	Labuan trust company	3	120,000
8.	Labuan leasing company or Labuan Islamic leasing company which has –		
	(a) not more than 10 related Labuan leasing companies or Labuan Islamic leasing companies;	2 for each group of Companies	100,000 for each Labuan leasing company or Labuan Islamic leasing Company
	(b) 11 to 20 related Labuan leasing companies or Labuan Islamic leasing companies;	3 for each group of Companies	100,000 for each Labuan leasing company or Labuan Islamic leasing Company

	(c) 21 to 30 related Labuan leasing companies or Labuan Islamic leasing companies; Or (d) more than 30 related Labuan leasing companies or Labuan Islamic leasing companies	4 for each group of Companies 1 additional employee for each group of companies for each increase of 10 related Labuan leasing companies or Labuan Islamic leasing companies	100,000 for each Labuan leasing company or Labuan Islamic leasing Company 100,000 for each Labuan leasing company or Labuan Islamic leasing company
9.	Labuan credit token company or Labuan Islamic credit token company	2	100,000
10.	Labuan development finance company or Labuan Islamic development finance company	2	100,000
11.	Labuan building credit company or Labuan Islamic building credit company	2	100,000
12.	Labuan factoring company or Labuan Islamic factoring company	2	100,000
13.	Labuan money broker or Labuan Islamic money broker	2	100,000
14.	Labuan fund manager	2	100,000
15.	Labuan securities licensee or Labuan Islamic securities licensee	2	100,000
16.	Labuan fund administrator	2	100,000
17.	Labuan company management	2	100,000
18.	Labuan International Financial Exchange	2	120,000
19.	Self-regulatory organisation or Islamic self-regulation organisation	2	120,000
20.	Labuan entity that carries on any one or more of the following business activity: (a) administrative services; (b) accounting services; (c) legal services; (d) backroom processing services; (e) payroll services; (f) talent management services; (g) agency services; (h) insolvency related services; (i) management services other than Labuan company management under item 17	1	50,000

10. LFSA had via a letter dated 24 January 2022 [\[APPENDIX 2\]](#) prescribed and detailed the activities under Item 20 of Schedule 1 of the Substance Regulation 2021 as follows:
- (a) *Administrative services*
Administrative services mean services pertaining to employee management, payroll management, property management, human resource management, financial planning, contract or subcontract management, facilities management or proposal management.
 - (b) *Accounting services*
Accounting services mean services pertaining to recording, analysing, summarizing or classifying financial, commercial and business transactions and information of a person or business.
 - (c) *Legal services*
Legal services mean -
 - (1) conveyancing services;
 - (2) legal advisory services;
 - (3) litigation or legal representation services in any proceedings before any court, tribunal or other authority; or
 - (4) legal dispute resolution services including alternative dispute resolution.
 - (d) *Backroom processing services*
Backroom processing services are services relating to settlements of receivables and payables, clearance, record maintenance, regulatory compliance or information technology (IT) related services which are usually performed by administration and support personnel who do not deal directly with client.
 - (e) *Payroll services*
Payroll services mean services relating to -
 - (1) processing, calculation, payment and deduction of remuneration, benefits, tax and statutory payment; or
 - (2) issuance of pay slip and tax statement.
 - (f) *Talent Management Services*
Talent management services mean the provision of human resource services to attract, onboard, develop, motivate, and retain employees.
 - (g) *Agency services*
Agency services mean the provision of specific services on behalf of another group, business, or person pursuant to an agency agreement between the agent and its client.
 - (h) *Insolvency related services*
Insolvency related service mean services related to administering company liquidations or winding up, or personal bankruptcy.
 - (i) *Management services*
Management services cover the organization and coordination of activities of a business in order to provide services to the clients and usually consist of organizing, supervising, monitoring, planning, controlling and directing business's resources such as human, financial and technology.
For avoidance of doubt, management services exclude company management as defined in section 129 of the Labuan Financial Services and Securities Act 2010.

11. **Under the Schedule 2 of Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 (“Substance Regulations 2021”) [APPENDIX 1] which was gazetted on 19 November 2021 and effective as from 19 November 2021 a Labuan entity carrying on a **Labuan non-trading activity** shall have the number of fit and proper full-time employees and an amount of annual operating expenditure as follows:**

(1) No.	(2) Labuan entity carrying on a Labuan non-trading activity.	(3) Minimum number of full time employees in Labuan	(4) Minimum amount of annual operating expenditure in Labuan (RM)
1.	Labuan entity that undertakes investment holding activities other than pure equity holding activities	1	20,000
2.	Labuan entity that undertakes pure equity holding activities	Exempted under the Labuan Business Activity Tax (Exemption) Order 2020 [PU(A) 177/2020]	20,000

12. For those Labuan entities carrying on Labuan business activities which is a Labuan trading activity that are NOT LISTED in the Substance Regulations 2021 [Para 9 and Para 11 above], in accordance with the decision of the High Court of Sabah and Sarawak in the Bright World Trading Co. Ltd & Ors vs Director General of Inland Revenue & Anor Judicial Review applications dated 13 June 2022¹, these Labuan entities NEED NOT have to comply with Section 2B(i)(b) of LBATA and shall be taxed under Section 4 of LBATA at 3% of audited net profits. [APPENDIX 3 and 3A]
13. Labuan Business Activity Tax (Exemption) 2020 (Amendment) Order 2021 [APPENDIX 4] exempts a Labuan entity carrying on a Labuan business activity related to pure equity holding from the application of subparagraph 2B(1)(b)(ii) (A) of the Act which states that:

“Section 2B. Labuan entity.

(1) *The Labuan entities-*

- (a) *shall be as specified in the Schedule; and*
- (b) *shall, for the purposes of the Labuan business Activity –*
 - (i) *in relation to a Labuan trading activity-*
 - (A) *have an adequate number of full-time employees in Labuan;*
 - (B) *have an adequate amount of annual*

¹ Appeals to the Court of Appeal against the High Court Decision (“the Appeals”) by the Ministry of Finance and IRB to the Court of Appeal were struck out by the Court of Appeal on 12 May 2023 and 26 September 2024, respectively. With that, the High Court Decision stands.

- (C) *operating expenditure in Labuan; and
comply with any condition in relation to a fit
and proper person for full time employees,*

*as prescribed by the Minister by regulations made under this
Act; and*

- (ii) *in relation to a Labuan non-trading activity-*
(A) *have an adequate number of full-time employees
in Labuan;*
(B) *have an adequate amount of annual
operating expenditure in Labuan;*
(C) *comply with any condition in relation to control
and management in Labuan; and*
(D) *comply with any condition in relation to a fit and
proper person for full time employees,*

as prescribed by the Minister by regulations made under this Act.”;

That means if a Labuan entity carrying on a Labuan business activity related to pure equity holding, it would not have to employ any fit and proper full-time employee but should incur RM20,000 annual operating expenditure in Labuan in order to qualify under the Substance Regulation 2021.

In addition, subparagraph 2B(1)(b)(ii)(C) of the Act requires that the said pure equity holding Labuan entity must comply with any condition in relation to control and management in Labuan. This means the Labuan pure equity holding entity must have a Board of Director meeting once every year in Labuan to determine importance business operations at the Board meeting in order to comply with control and management in Labuan.

14. For the purpose of complying with the management and control requirements in Labuan by Labuan entities that undertake pure equity holding activities, the following requirements shall be observed:
- (a) To comply with Para 5.5 of Inland Revenue Board's Public Ruling No. 5/2011 (Residence Status of Companies and Bodies of Person) dated 16 May 2011 (Replaced by Para 5.7 of PR 9/2019 dated 6/12/2019 which is similar) [\[APPENDIX 4A\]](#);
 - (b) Have its registered office in Labuan;
 - (c) Appoint Labuan trust company as resident secretary in Labuan; and
 - (d) Keeps its accounting and business records including minutes of meeting in Labuan.
15. Para 5.5 of IRB Public Ruling No. 5/2011 (Replaced by Para 5.7 of PR 9/2019 dated 6/12/2019 which is similar) states that:
- (a) Management and control is the key factor used to ascertain the residence status of a company in Malaysia². The management and control refers to

² Note: should be in Labuan for Labuan pure equity holding entities

the controlling authority which determines the policies to be followed by the company. The management and control is considered to be exercised where the directors meet to conduct the company's business/affairs irrespective of where the company might be incorporated. The management and control of a business of a company would depend upon how the business is managed. If, at any time during the basis year for a year of assessment at least one meeting of the board of directors is held in Malaysia/(Labuan) concerning the management and control of the company, even though all other meetings are held outside Malaysia/(Labuan) then the company is resident in Malaysia/(Labuan) for that basis year.

- (b) The location of the trading activities or the place of physical operations may not necessarily be the place of management and control. A company engaged in trading activities in Malaysia/(Labuan), will not be resident in Malaysia/(Labuan), if it is found that not only the trading activities, e.g. manufacturing or producing and selling are controlled abroad but also that the meetings of the shareholders and directors, at which all its important affairs are conducted and controlled, are also held abroad.
 - (c) The appointment of a local director or local board of directors in Malaysia/(Labuan) does not determine the residence status of a company. If the controlling authority is exercised by the directors who are at the company's head office overseas, then the company is not a resident in Malaysia/(Labuan).
 - (d) Control by the directors determines the management and control of a company. The directors exercise their powers in the management of the company's affairs by virtue of the powers conferred upon them under the Articles of Association. On the other hand, control by the shareholders is not relevant for the determination of the management and control as shareholders exercise their power over the company by virtue of their voting power at formal meetings of shareholders.
 - (e) The residence status of a director does not determine the residence status of a company.
16. The Income Tax (Deductions Not Allowed for Payment Made to Labuan Company by Resident) Rules 2018 [\[APPENDIX 5\]](#) which was gazetted on 31 December 2018 and Income Tax (Deductions Not Allowed for Payment Made to Labuan Company by Resident) Rules 2018 (Amendment) 2020 ("ND Rules 2020") [\[APPENDIX 6\]](#) which was gazetted on 23 December 2019 prescribed that the following types of payment made by a resident will not be allowed for deduction under Section 39(1)(r) of the ITA when computing for the Malaysian resident entity's income tax liability:

No.	Type of payment	Amount not allowed for deduction
1.	Interest payment	25% (including all payments relating to financing e.g. commission, facility & upfront fees)
2.	Lease rental	25% of the amount of payment
3.	Other payments	97% of the amount of payment

In addition, the ND Rules 2020 are not applicable to the following:

- (a) Transactions between Labuan International Commodity Trading Company(LITC) and Malaysian residents;
- (b) Transactions between Labuan entities that have opted to pay tax under Income Tax Act 1967 (ITA) and Malaysian residents; and
- (c) Transactions between Labuan entities that are paying taxes under ITA and Labuan entities that are paying taxes under Labuan Business Activity Tax Act1990 whether the LE had complied with the SR or not.

The effective date for the above changes is from 1 January 2019.

However, with effect from 1 January 2021, transactions between Labuan entities that do not comply with SR (ie whether paying tax at 3% or 24% under LBATA) and residents will be subject to the ND Rules 2020, and 97% of the amount of payment by residents will be disallowed.

17. “Resident” means resident in Malaysia for the basis year for a year of assessment(YA) by virtue of section 8 and subsection 61(3) of the ITA.

Section 8. Residence: companies and bodies of persons.

- (1) *For the purposes of this Act-*
 - (a) *a Hindu joint family is resident in Malaysia for the basis year for a year of assessment if its manager or karta is resident for that basis year;*
 - (b) *a company or a body of persons (not being a Hindu joint family) carrying on a business 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*
 - (c) *any other company or body of persons (not being a Hindu joint family) 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 or other controlling authority.*
- (1A) *Notwithstanding subsection (1), for the purposes of this Act-*
 - (a) *a limited liability partnership carrying on a business 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;*
 - (b) *any other limited liability partnership 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 partners;*
 - (c) *a business trust is resident in Malaysia for the basis year for a year of assessment if the trustee manager of that business trust is resident in Malaysia and a trustee manager of a business trust is resident for the basis year for a year of assessment if-*
 - (i) *the trustee manager in his capacity as such carries on such business trust in Malaysia; and*
 - (ii) *the management and control of the business of such business trust is exercised in Malaysia;*

Section 61(3) Trust Generally

- (3) *Notwithstanding any other provision of this Act, a trust body shall be regarded as resident for the basis year for a year of assessment if, but only if, any trustee member of that body is resident for that basis year:
Provided that where-*

- (a) *the trust was created outside Malaysia by a person or persons who were not citizens;*
- (b) *the income of that trust body for that basis year is wholly derived from outside Malaysia;*
- (c) *the trust is administered for the whole of that basis year outside Malaysia; and*
- (d) *at least one-half of the number of the member trustees are not resident in Malaysia for that basis year, that trust body shall not be regarded as resident in Malaysia for that basis year.*

18. Under S 16A of LBATA:

- (a) Where any tax is due and payable under LBATA by a company, any person who is a resident director of that company during the period in which that tax is liable to be paid by that company, shall be jointly and severally liable for such tax that is due and payable and shall be recoverable from that person.
- (b) “director” means any person who-
 - (3) is occupying the position of director, by whatever name called, including any person who is concerned in the management of the company’s business; and
 - (4) is, either on his own or with one or more associates, the owner of, or able directly or through the medium of other companies or by any other indirect means to control, not less than twenty per cent of the ordinary share capital of the company.
- (c) For the purposes of paragraph (2)(b) above, “associate” means, in relation to a person-
 - (1) in any of the following relationships to that person, that is to say, husband or wife, parent or remote forebear, child or remoter issue, brother, sister and partner;
 - (2) the trustee or trustees of a settlement in relation to that person is, or any such relative of his, living or dead, as is mentioned in paragraph (a) of this definition is or was, a settlor;
 - (3) where that person is interested in any shares or obligations of a company which are subject to any trust or are part of the estate of a deceased person, any other person interested therein.”.

19. Labuan International Commodity Trading Company (“LITC”)

- (a) “Labuan International Commodity Trading Company” means a Labuan company which-
 - (1) is incorporated or registered under the Labuan Companies Act 1990;
 - (2) is licensed under section 92 of the Labuan Financial Services and Securities Act 2010;
 - (3) maintains a registered office in Labuan but is allowed to establish its business operational office anywhere in Malaysia; and
 - (4) undertakes a qualifying activity under the Global Incentives for Trading programme;
- (b) Under the Labuan Business Activity Tax (Requirements for Labuan International Commodity Trading Company) Regulations 2021 (“LITC Regulations 2021”) [\[APPENDIX 7\]](#), a LITC which is a Labuan entity carrying on a Labuan business activity shall in a basis period for a year of

assessment fulfill the following requirements:

- (1) have at least three full-time employees; and
 - (2) have an annual operating expenditure of at least three million ringgit (RM3,000,000.00).
- (c) Where the LITC has not more than five related companies to carry on the qualifying activity, that LITC shall-
- (1) have not less than three full-time employees including at least two of them are full-time employees in its business operational office in Labuan in a group of companies; and
 - (2) incur an annual operating expenditure of at least three million ringgit (RM3,000,000.00) in Malaysia including at least one hundred thousand ringgit (RM100,000.00) therefrom is incurred in Labuan for each company.
- (d) Subject to (3) above, where the LITC has more than five related companies to carry on the qualifying activity, that LITC shall also have an additional full-time employee in its business operational office in Labuan for every addition of up to five related companies in a group of companies.
- (e) For the purpose of the LITC Regulations 2021, companies are deemed to be in the same group where-
- (1) two or more companies are related companies;
 - (2) a company is so related to another company which is itself so related to a third company;
 - (3) the same person is holding more than fifty per cent of the shares in each of two or more companies; or
 - (4) each of two or more companies is so related to at least one of two or more companies to which paragraph (c) applies.
- (f) In the LITC Regulations 2021:

“qualifying activity” means the trading of physical products and related derivative instruments in relation to-

- (1) petroleum and petroleum-related products including liquefied natural gas
- (2) minerals;
- (3) agriculture products;
- (4) refined raw materials;
- (5) chemicals;
- (6) base minerals; or
- (7) coal;

“Global Incentives for Trading” means a programme of incentives for a LITC to use Malaysia as its international trading base to undertake a qualifying activity;

“related companies” means companies that are deemed to be related to each other in accordance with section 4 of the Labuan Companies Act 1990.

- (g) LITC which complies with the Substance Regulations 2021 in a year of assessment shall be subject to tax at 3% of its audited net profits under LBATA. Any LITC that can not fulfil the requirements of Substance Regulations 2021 in a year of assessment shall be subject to tax at 24% of the net audited profits under LBATA.
- (h) The “Guidelines on the Establishment of Labuan International Commodity Trading Company under the Global Incentives for Trading Programme” [\[APPENDIX 8\]](#) issued by LFSA prescribed that The LITC is required to establish its operational office, which can be anywhere in Malaysia.

The LITC must comply with the following conditions after commencement of its business:

- (1) Achieve minimum annual turnover of USD50 million;
- (2) Incur minimum annual business spending of RM3 million payable to Malaysian residents in Malaysian Ringgit; and
- (3) Employ at least three professional traders that fulfill the following requirements:
 - (a) The Principal Officer or any person performing a senior management function who would be principally accountable for:
 - (i) making decisions that affect the whole, or a substantial part of the LITC business;
 - (ii) implementing and enforcing policies and strategies approved by the LITC’s Board of Directors including Head of Department or any equivalent designated person; or
 - (iii) internal controls and processes of the LITC.
 - (b) These professional traders shall be involved in any one of the following areas:
 - (i) Trading;
 - (ii) Risk Management;
 - (iii) Procurement; or
 - (iv) Sales & Marketing.
 - (c) These professional traders shall be residents of Malaysia in a calendar year for the year of assessment under the Income Tax Act 1967 (ITA).
- (4) The LITC is expected to comply with all the requirements of this Guidelines as well as the applicable laws, rules and regulations relevant to the LITC at all times. In addition, the LITC is expected to obtain the necessary approvals from the authorities in the markets it intends to operate in prior to commencing its business in those respective markets, where applicable.

- (5) The annual turnover was revised to USD 25 million for petroleum and petroleum-related products including liquefied natural gas and to USD10 million for products other than petroleum and petroleum-related products including liquefied natural gas to USD 10 million by the Circular “Relaxation of Regulatory and Operational Requirements for Labuan International Trading Companies, Labuan Digital Banks and Labuan Protected Cell Companies (PCC)” issued by LFSA on 22 November 2022). [\[APPENDIX 9\]](#)

20. In summary, under LBATA:

- (a) “Labuan business activity” means a Labuan trading or a Labuan non-trading activity **carried on in, from or through Labuan**, excluding any activity which is an offence under any written law.

There is no more restriction on a LE carrying on business activity with Malaysian residents and the LE can also carrying business in Ringgit Malaysia.

However, please refer to Para 15 on the restriction placed on the domestic Malaysian resident entities on the payments made to Labuan entities.

- (b) **For those Labuan entities that are listed under the Substance Regulations (Refer Para 9 and Para 11 above), only *having been determined as a Labuan entity under the Substance Regulations* (by complying with the prescribed number of fit and proper full-time employees and minimum annual operating expenditures in Labuan and carrying on a PRESCRIBED Labuan business activities as listed therein) then this entity shall qualify to be taxed under LBATA and shall be considered as a *qualified Labuan entity*. [\[Section 2B\(1\) of LBATA\]](#)**

- (c) (1) A **qualified Labuan entity** that carries out a *Labuan business activity which is a Labuan trading activity as listed under Schedule 1 and Schedule 2 of the Substance Regulations*) [\[Para 9 and Para 11 above\]](#) shall be charged to tax at the rate of **three (3) percent** upon its chargeable profits for that year of assessment. [\[Section 4\(1\) of LBATA\]](#)

- (2) *However, Labuan trading activities do 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. Any income derived from intellectual property right is subject to tax under the Income Tax Act 1967. [\[Section 4\(3\) and 4\(4\) of LBATA\]](#)*

- (3) “intellectual property right” means a right arising from any patent, utility innovation and discovery, copyright, trademark and service mark, industrial design, layout -design of integrated circuit, secret processes or formulae and know-how, geographical indication and the grant of protection of a plant variety, and other like rights, whether or not registered or registrable. [\[Section 4\(5\) of LBATA\]](#)

- (d) A **qualified Labuan entity** that carries out a *Labuan business activity which is a Labuan non-trading activity* (an activity relating to the holding of investments in securities, stock, shares, loans, deposits or any other properties situated in Labuan by a Labuan entity on its own behalf) for the basis period for a year of assessment **shall not be charged to tax** for that year of assessment. *[Section 9(1) of LBATA]*
- (e) A **qualified Labuan entity** that carries out BOTH a *Labuan business activity which is a Labuan trading activity and a business activity which is a Labuan non-trading activity* for the basis period for a year of assessment the entity shall be charged to tax at the rate of **three (3) percent** upon its chargeable profits for that year of assessment. *[Section 2(2) of LBATA]*
- (f) A **Labuan entity** which is *carrying on a Labuan business activity as specified in the SR* but **fails to comply** with Substance Regulations for a basis period for a year of assessment shall be charged to tax at the rate of **twenty-four (24) percent** upon its chargeable profits for that year of assessment. A **Labuan entity** that carries out BOTH a *Labuan business activity which is a Labuan trading activity and a business activity which is a Labuan non-trading activity as specified in the SR* but **fails to comply** with Substance Regulations for the basis period for a year of assessment the entity shall be charged to tax at the rate of **twenty-four (24) percent** upon its chargeable profits for that year of assessment. *[Section 2B(1A) of LBATA]*
- (g) When a Labuan entity is carrying on many categories of business activities, then each category of business activity will be considered a separate source and each category on itself has to comply with the Substance Regulations in order to be taxed at the preferential rate of 3% of the chargeable profits.

The Labuan entity besides lodging LE1, LE4, or LE5 has to submit an appendix to analyse the separate category of income and the net profits for each category if this is not shown in the audited accounts.

- (h) *In accordance with the decision of the High Court of Sabah and Sarawak in the Bright World Trading Co. Ltd & Ors vs Director General of Inland Revenue & Anor Judicial Review applications dated 13 June 2022, a Labuan entity carrying on a Labuan business activity which is a Labuan trading activity and NOT LISTED under the Substance Regulation 2021 NEED NOT have to comply with the economic substance requirement listed under Section 2B(i)(b) of LBATA and shall be taxed under Section 4 of LBATA at 3% of audited net profits.*
- (i) A Labuan entity will be taxed under ITA if the entity receives income during the financial year:
 - (1) which is NOT a Labuan business activity (a Labuan trading or a Labuan non-trading activity) carried on in, from or through Labuan); or
 - (2) from an intellectual property right [Section 4(3) and (4) of LABATA]; or
 - (3) from a foreign branch whose business activities are not carried on in, from or through Labuan; or
 - (4) from foreign investments which are not carried on in, from or through Labuan;

The above income shall be taxed under the ITA as in accordance with Section 2(3) of Labuan Business Activity Tax Act, 1990, ("LBATA") it is declared that the provisions (as per Clause 16 below) of the Income Tax Act, 1967 ("ITA") shall apply in respect of an activity other than a Labuan business activity carried on by a Labuan entity. *[Section 2(3) of LBATA]*.

21. A Labuan entity may make an irrevocable election in the prescribed form that any profit of the Labuan entity for any basis period for a year of assessment and subsequent basis period to be charged to tax in accordance with the Income Tax Act 1967 in respect of that Labuan business activity under Section 3A of LBATA.

If the Labuan entity makes an election under Section 3A then all the provisions of the ITA shall apply including that the entity shall:

- (a) be taxed on a current year basis;
 - (b) provide estimated income within three months of commencing operations;
 - (c) be subject to tax audit and tax investigation provisions; and
 - (d) be taxed at the prevailing corporate tax rate for income derived from activities within Malaysia.
22. A LITC which complies with the Substance Regulations 2021 in a year of assessment shall be subject to tax at 3% of its audited net profits under LBATA. Any LITC that can not fulfil the requirements of Substance Regulations 2021 in a year of assessment shall be subject to tax at 24% of the net audited profits under LBATA.

Disclaimer:

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22 November 2021
22 November 2021
P.U. (A) 423

WARTA KERAJAAN PERSEKUTUAN

*FEDERAL GOVERNMENT
GAZETTE*

PERATURAN-PERATURAN CUKAI AKTIVITI
PERNIAGAAN LABUAN (KEHENDAK BAGI AKTIVITI
PERNIAGAAN LABUAN) 2021

*LABUAN BUSINESS ACTIVITY TAX (REQUIREMENTS FOR
LABUAN BUSINESS ACTIVITY) REGULATIONS 2021*

DISIARKAN OLEH/
PUBLISHED BY
JABATAN PEGUAM NEGARA/
ATTORNEY GENERAL'S CHAMBERS

LABUAN BUSINESS ACTIVITY TAX ACT 1990

LABUAN BUSINESS ACTIVITY TAX
(REQUIREMENTS FOR LABUAN BUSINESS ACTIVITY) REGULATIONS 2021

IN exercise of the powers conferred by paragraph 21(1)(a) read together with paragraph 2B(1)(b) of the Labuan Business Activity Tax Act 1990 [Act 445], the Minister makes the following regulations:

Citation and commencement

1. (1) These regulations may be cited as the **Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021**.

(2) Except for regulation 3, these Regulations are deemed to have come into operation on 1 January 2019.

(3) Regulation 3 is deemed to have come into operation on 1 January 2021.

Requirements for Labuan business activity

2. A Labuan entity carrying on a Labuan business activity shall have the number of full time employees and the amount of annual operating expenditure—

(a) in relation to a Labuan trading activity, as specified in the First Schedule;
and

(b) in relation to a Labuan non-trading activity, as specified in the Second Schedule,

in the basis period for a year of assessment.

Control and management in Labuan

3. For the purpose of item 2 of Second Schedule, a Labuan entity carrying on a Labuan business activity shall comply with the conditions in relation to control and management in Labuan as follows:

- (a) meeting of the board of directors is convened in Labuan at least once a year;
- (b) the registered office of the Labuan entity shall be situated in Labuan;
- (c) the secretary of the Labuan entity appointed under the Labuan Companies Act 1990 [*Act 441*] shall be resident in Labuan; and
- (d) the accounting and business records including the minutes of meeting of the Labuan entity's board of directors shall be kept in Labuan.

Provisions relating to the company

4. For the purposes of company as specified in the First Schedule and Second Schedule—

- (a) a company shall be deemed to be related to another company in accordance with section 4 of the Labuan Companies Act 1990; and
- (b) where—
 - (i) two or more companies are related within the meaning of section 4 of the Labuan Companies Act 1990;
 - (ii) a company is so related to another company which is itself so related to a third company;
 - (iii) the same person is holding more than fifty per cent of the shares in each of two or more companies; or
 - (iv) each of two or more companies is so related to at least one of two or more companies to which subparagraph (iii) applies,

all these companies are deemed to be in the same group.

Revocation

5. The Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 [P.U. (A) 392/2018] is revoked.

FIRST SCHEDULE

[Regulation 2 and 4]

(1) <i>No.</i>	(2) <i>Labuan entity carrying on a Labuan trading activity</i>	(3) <i>Minimum number of full time employees in Labuan</i>	(4) <i>Minimum amount of annual operating expenditure in Labuan (RM)</i>
1.	Labuan insurer, Labuan reinsurer, Labuan takaful operator or Labuan retakaful operator	3	200,000
2.	Labuan underwriting manager or Labuan underwriting takaful manager	4	100,000
3.	Labuan insurance manager or Labuan takaful manager	4	100,000
4.	Labuan insurance broker or Labuan takaful broker	2	100,000
5.	Labuan captive insurer or Labuan captive takaful—		
	(a) Labuan first party captive insurer or Labuan first party captive takaful; or	2	100,000
	(b) Labuan third party captive insurer or Labuan third party captive takaful	3	100,000

(1) No.	(2) <i>Labuan entity carrying on a Labuan trading activity</i>	(3) <i>Minimum number of full time employees in Labuan</i>	(4) <i>Minimum amount of annual operating expenditure in Labuan (RM)</i>
6.	Labuan bank, Labuan investment bank, Labuan Islamic bank or Labuan Islamic investment bank	3	200,000
7.	Labuan trust company	3	120,000
8.	Labuan leasing company or Labuan Islamic leasing company which has— (a) not more than 10 related Labuan leasing companies or Labuan Islamic leasing companies; (b) 11 to 20 related Labuan leasing companies or Labuan Islamic leasing companies; (c) 21 to 30 related Labuan leasing companies or Labuan Islamic leasing companies; or (d) more than 30 related Labuan leasing companies or Labuan Islamic leasing companies	2 for each group of companies 3 for each group of companies 4 for each group of companies 1 additional employee for each group of companies for each increase of 10 related Labuan leasing companies or Labuan Islamic leasing companies	100,000 for each Labuan leasing company or Labuan Islamic leasing company 100,000 for each Labuan leasing company or Labuan Islamic leasing Company 100,000 for each Labuan leasing company or Labuan Islamic leasing company 100,000 for each Labuan leasing company or Labuan Islamic leasing company

(1) <i>No.</i>	(2) <i>Labuan entity carrying on a Labuan trading activity</i>	(3) <i>Minimum number of full time employees in Labuan</i>	(4) <i>Minimum amount of annual operating expenditure in Labuan (RM)</i>
9.	Labuan credit token company or Labuan Islamic credit token company	2	100,000
10.	Labuan development finance company or Labuan Islamic development finance company	2	100,000
11.	Labuan building credit company or Labuan Islamic building credit company	2	100,000
12.	Labuan factoring company or Labuan Islamic factoring company	2	100,000
13.	Labuan money broker or Labuan Islamic money broker	2	100,000
14.	Labuan fund manager	2	100,000
15.	Labuan securities licensee or Labuan Islamic securities licensee	2	100,000
16.	Labuan fund administrator	2	100,000
17.	Labuan company management	2	100,000
18.	Labuan International Financial Exchange	2	120,000

(1) No.	(2) <i>Labuan entity carrying on a Labuan trading activity</i>	(3) <i>Minimum number of full time employees in Labuan</i>	(4) <i>Minimum amount of annual operating expenditure in Labuan (RM)</i>
19.	Self-regulatory organisation or Islamic self-regulation organisation	2	120,000
20.	Labuan entity that carries on any one or more of the following business activity: (a) administrative services; (b) accounting services; (c) legal services; (d) backroom processing services; (e) payroll services; (f) talent management services; (g) agency services; (h) insolvency related services; (i) management services other than Labuan company management under item 17	2	50,000

SECOND SCHEDULE

[Regulation 2 and 4]

(1) <i>No.</i>	(2) <i>Labuan entity carrying on a Labuan non-trading activity</i>	(3) <i>Minimum number of full time employees in Labuan</i>	(4) <i>Minimum amount of annual operating expenditure in Labuan (RM)</i>
1.	Labuan entity that undertakes investment holding activities other than pure equity holding activities	1	20,000
2.	Labuan entity that undertakes pure equity holding activities	Exempted under the Labuan Business Activity Tax (Exemption) Order 2020 [P.U. (A) 177/2020]	20,000

Made 19 November 2021

[MOF.TAX (S) 700-2/1/76; PN(PU2)491/IV]

TENGGU DATUK SERI UTAMA ZAFRUL BIN TENGGU ABDUL AZIZ
Minister of Finance



**GUIDELINES ON PRESCRIBED LABUAN
BUSINESS ACTIVITIES FOR
NON-LICENSED TRADING ENTITIES IN LABUAN
INTERNATIONAL BUSINESS AND FINANCIAL
CENTRE (LIBFC)**

1.0 Introduction and Legal Provision

- 1.1 These Guidelines are issued pursuant to section 4A of the Labuan Financial Services Authority Act 1996 (LFSAA) to clarify the Labuan business activities as prescribed in item 20 of the First Schedule of the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 [P.U.(A) 423/2021] (Regulation).

2.0 Applicability

- 2.1 These Guidelines are applicable to any Labuan financial institution (as defined in section 2(1) of the LFSAA) that undertakes any of the Labuan business activities as prescribed in item 20 of the First Schedule of the Regulation.

3.0 Effective Date

- 3.1 These Guidelines shall be deemed to have come into effect on 1 January 2019.

4.0 Prescribed Labuan Business Activities

- 4.1 The Labuan business activities as prescribed in Item 20 of the First Schedule of the Regulation are any one or more of the following :
- (a) administrative services;
 - (b) accounting services;
 - (c) legal services;
 - (d) backroom processing services;
 - (e) payroll services;
 - (f) talent management services;
 - (g) agency services;
 - (h) insolvency related services;
 - (i) management services other than Labuan company management under item 17 of the First Schedule of the Regulation.

5.0 Details of Prescribed Labuan Business Activities

Details of the Labuan Business activities as prescribed under item 20 of the First Schedule of the Regulation are as follows:

5.1 Administrative services

Administrative services mean services pertaining to employee management, payroll management, property management, human resource management, financial planning, contract or subcontract management, facilities management or proposal management.

5.2 Accounting services

Accounting services mean services pertaining to recording, analysing, summarizing or classifying financial, commercial and business transactions and information of a person or business.

5.3 Legal services

Legal services mean –

- (a) conveyancing services;
- (b) legal advisory services;
- (c) litigation or legal representation services in any proceedings before any court, tribunal or other authority; or
- (d) legal dispute resolution services including alternative dispute resolution.

5.4 Backroom processing services

Backroom processing services are services relating to settlements of receivables and payables, clearance, record maintenance, regulatory compliance or information technology (IT) related services which are usually performed by administration and support personnel who do not deal directly with client.

5.5 Payroll services

Payroll services mean services relating to –

- (a) processing, calculation, payment and deduction of remuneration, benefits, tax and statutory payment; or
- (b) issuance of payslip and tax statement.

5.6 Talent Management Services

Talent management services mean the provision of human resource services to attract, onboard, develop, motivate, and retain employees.

5.7 Agency services

Agency services mean the provision of specific services on behalf of another group, business, or person pursuant to an agency agreement between the agent and its client.

5.8 Insolvency related services

Insolvency related service mean services related to administering company liquidations or winding up, or personal bankruptcy.

5.9 Management services

Management services cover the organization and coordination of activities of a business in order to provide services to the clients and usually consist of organizing, supervising, monitoring, planning, controlling and directing business's resources such as human, financial and technology.

For avoidance of doubt, management services exclude company management as defined in section 129 of the Labuan Financial Services and Securities Act 2010.

6.0 Any enquiries on these Guidelines may be forwarded to the following contact details:

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Business Policy Unit
Labuan Financial Services Authority
Level 17, Main Office Tower
Financial Park Complex
Jalan Merdeka
87000 Federal Territory of Labuan

Telephone no. : 087 591200
Fax no. : 087 453442/413328
Email : bpu@labuanfsa.gov.my

Labuan Financial Services Authority
24 January 2022



Circular No 1/2025

Date: 26 February 2025

To: All members of the Association of Labuan Trust Companies, Malaysia (“ALTC”)

SUCCESSFUL RESOLUTION OF JUDICIAL REVIEW APPLICATIONS CHALLENGING THE DECISIONS OF THE DIRECTOR GENERAL OF INLAND REVENUE AND MINISTER OF FINANCE REGARDING THE SUBSTANCE REGULATIONS

We are pleased to inform that the judicial review applications initiated by Messrs. Shearn Delamore & Co. (“**Shearn**”) on behalf of the ALTC and more than 170 Labuan entities (“**the Applicants**”) from 2021 onwards (“**JR Cases**”) to challenge the legality and validity of the decisions (“**the Impugned Decisions**”) of the Director General of Inland Revenue (“**DGIR**”) and the Minister of Finance (“**MOF**”) concerning the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 [P.U.(A) 392/2018] and the Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 [P.U.(A) 375/2020], as well as, and Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 [P.U.(A) 423/2021], have been successfully concluded in favour of the Applicants.

This circular outlines the salient developments in the JR Cases and their implications for the Applicants and other affected Labuan entities.

1. FIRST JUDICIAL REVIEW (“1st JR”)

A. Background of the 1st JR:

As members may be aware, the **Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 [P.U.(A) 392/2018]** (“**2018 Regulations**”), which was gazetted on 31 December 2018 and purportedly effective from 1 January 2019, purported to list **21** categories of “*Labuan business activities*” that were subject to the corresponding “Substance Requirements”, i.e. a minimum requisite number of full-time employees in Labuan and annual operating expenditure in Labuan.

In 2020, ALTC was informed that an additional category of activities would be inserted into the 2018 Regulations namely, “**Code 23**” i.e. “**Other trading activity – Labuan entity that carries out administrative, accounting and legal services including backroom processing, payroll services, talent management, agency services, insolvency related services and management services**” (“**Code 23**”¹).

¹ “Code 23” is the new “Item 20” of the First Schedule to the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 [P.U.(A) 423/2021].



Thereafter, the **Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 [P.U.(A) 375/2020]** (“**2020 Regulations**”) were gazetted by MOF on 24 December 2020. The 2020 Regulations purported to amend the 2018 Regulations retrospectively with effect from 1 January 2019 and also purported to retrospectively introduce two new categories of Labuan business activities under “*Item 21*” and “*Item 22*” that were not previously subject to any “Substance Requirements”.

However, as members would be aware, “**Code 23**” was not included in the 2018 Regulations or the 2020 Regulations. Thereafter, the DGIR had, vide a letter dated 5 February 2021 (“**DGIR’s Letter**”), taken the position that Labuan entities and activities that are not listed in the Schedule to the 2018 Regulations and the 2020 Regulations (“**Non-Listed Activities**”) would be defaulted to and be subjected to tax under the Income Tax Act 1967 (“**ITA**”) at the rate of 24%.

Subsequently, the MOF agreed with the DGIR, and vide their letter dated 1 April 2021 (“**MOF’s Letter**”), wrote to the ALTC stating that Non-Listed Activities would automatically be taxed under the ITA instead of the Labuan Business Activity Tax Act 1990 (“**LBATA**”).

Thereafter, many Labuan entities that were affected by the DGIR’s Letter and the MOF’s Letter, participated in the 1st JR.

In this regard, for the purpose of the court proceedings, the Applicants whose business activities fell under “Code 23” were grouped into one category as “**Category A**” while the Applicants who did not fall under “Code 23” and instead carried on business activities which were never included in the 2018 Regulations and the 2020 Regulations, were grouped into another category as “**Category B**”.

B. High Court Decision (13 June 2022)

On 13 June 2022, the learned High Court Judge ruled in favour of the Applicants and quashed both the IRB’s Letter and the MOF’s Letter, among others in the 1st JR (“**High Court Decision**”). The brief grounds/orders of the High Court Decision and its ramifications are set out below:

- a. the 2018 Regulations and the 2020 Regulations were held to be invalid;
- b. as both these regulations were invalid, there were no “Substance Requirements” applicable to the Applicants prior to the issuance of the new substance regulations, namely, the **Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 [P.U.(A) 423/2021]** (“**2021 Regulations**”) which were only gazetted on 22 November 2021;
- c. even then, the High Court held that the 2021 Regulations could not have any retrospective effect all the way back to 1 January 2019 as that would take away the



Applicants' vested rights. As such, the 2021 Regulations could only apply prospectively, i.e. from 22 November 2021;

- d. as a result, prior to the 2021 Regulations, no substance requirements were prescribed for the Applicants and for that period, they continued to be taxed under LBATA, not the ITA; and
- e. as the MOF's Letter and DGIR's Letter also stated that Non-Listed Activities were to be taxed under the ITA, the quashing of these letters meant that the Non-Listed Activities were also entitled to be taxed under LBATA according to the High Court Decision.

C. Appeals to the Court of Appeal

Thereafter, both the DGIR and MOF filed their respective appeals to the Court of Appeal against the High Court Decision ("**the Appeals**").

However, the Applicants applied to the Court of Appeal to strike out the Appeals and on 12 May 2023 and 26 September 2024, the MOF's Appeal and the DGIR's Appeal respectively were struck out by the Court of Appeal.

With that, the 1st JR was concluded in the Applicants' favour and the High Court Decision stands.

2. SECOND JUDICIAL REVIEW ("2nd JR")

A. Background of the 2nd JR:

After the 2021 Regulations were issued, the Applicants under Category A (i.e. "Code 23"/ "Item 20" entities) filed another judicial review application, i.e. the 2nd JR, to argue that the "Substance Requirements" imposed by the 2021 Regulations could only apply after 2021 due to issues of actual and practical impossibility in complying with the same.

B. Settlement (10 December 2024)

Thereafter, a binding Consent Order was recorded before the High Court on 10 December 2024 ("**the Consent Order**"), confirming that the Applicants falling under Category A need only comply with the "Substance Requirements" imposed under the 2021 Regulations from such Applicant's first complete annual period or full 12-month financial/accounting period commencing on or after 23 November 2021.

With the recording of the Consent Order, we are pleased to announce that the 2nd JR has also been successfully concluded in the Applicants' favour.

3. IMPLICATIONS OF THE OUTCOMES OF THE 1st JR AND 2nd JR

Applicants	1 st JR	2 nd JR
Category A	- No “Substance Requirements” prior to the gazette of the 2021 Regulations - Only need to carry on a "<i>Labuan trading activity</i>" to qualify for 3% tax rate under Section 4(1) of LBATA.	Must comply with the “Substance Requirements” as imposed under the 2021 Regulations with effect from such Applicant’s first complete annual period or full 12-month financial or accounting period commencing on or after 23 November 2021.
Category B	- No “Substance Requirements” - Only need to carry on a "<i>Labuan trading activity</i>" to qualify for 3% tax rate under Section 4(1) of LBATA.	[N/A as the Applicants under Category B did not take part in the 2 nd JR.]

In short, moving forward, the Applicants under Category A are required to comply with the “Substance Requirements” as imposed under the 2021 Regulations from such Applicant’s first complete annual period or full 12-month financial or accounting period commencing on or after 23 November 2021 in order to qualify for 3% tax rate under Section 4(1) of LBATA while the Applicants under Category B only have to carry on a "*Labuan trading activity*" to qualify for 3% tax rate under Section 4(1) of LBATA without the need to comply with any “Substance Requirements”.

4. IMPLICATIONS FOR NON-PARTICIPATING LABUAN ENTITIES

Subject to the fulfilment of certain conditions, the Labuan entities that did not participate in the 1st JR or the 2nd JR but wish to challenge the DGIR's/MOF's decision(s) on the abovementioned issues may still do so.

For instance, if you are not named as an Applicant in the above 1st JR or 2nd JR but the Revenue sends you a letter or raises an assessment to insist that the unlawful Substance Regulations apply to you for years of assessment prior to 2021, then you have three (3) months within which to file an application to seek leave to apply for judicial review.



Similarly, if the Revenue refuses to accept your tax returns or other tax filing under LBATA and insists that you file under the ITA even though you carried on a Labuan business activity, you may still be able to file an application to seek leave to apply for judicial review within three (3) months of any such adverse decisions.

All such applications for leave to apply for judicial review will be heard before the High Court. From there, there is a right of appeal to the Court of Appeal and from there, a right to apply for leave to appeal to the Federal Court.

In addition, all disputed assessments issued by the Revenue also need to be appealed against via notices of appeal (Forms Q) within 30 days. Any such disputes that remain unresolved may be appealed to the Special Commissioners of Income Tax (“SCIT”) with rights of appeal to the High Court and from there, to the Court of Appeal.

Further, if you have mistakenly complied and overpaid more tax than you should have for year of assessment 2021 or prior years of assessment, you may be able to apply to the DGIR for relief on account of such error or mistake. The application must be made within five (5) years after the end of the year of assessment within which the assessment was made. Any disputes on the application for relief may be referred to the SCIT with rights of appeal to the High Court and from there, to the Court of Appeal.

Finally, any dispute arising with the Revenue or any administrative authority may be disputed within certain strict timelines and members should seek legal advice if they are aggrieved by any assessment or decision in this regard.

***Note:** This circular was prepared by Mr. Anand Raj and Ms. Irene Yong from Shearn as a follow up to the briefing session held in Labuan on 18 December 2024 and to summarise the key developments to-date. In order to keep this circular concise and readable, this circular only contains a summary of the selected issues and is not nor is it intended to be an exhaustive document on this subject. This circular is not a substitute for a tax law review or advice nor does this circular constitute legal advice on any general or specific transactions, arrangements, documents or business practices. This circular will not be updated for any changes, modifications or amendments in law, legislation, rules, regulations or any other subordinate legislation unless specifically requested and instructed by ALTC.*

*If you require further information from Shearn, you may contact them at:
Irene (irene.yong@shearndelamore.com)/ Analise (analise@shearndelamore.com) / Chantal (chantal@shearndelamore.com).*

- A **Bright World Trading Co Ltd & Ors v Director General of
Inland Revenue & Anor and applications**
- B HIGH COURT (KOTA KINABALU) — APPLICATION FOR JUDICIAL
REVIEW NO LBN-25JR-75/5 OF 2021, LBN-25JR-18/4 OF 2021 AND
LBN-25-17/6 OF 2021
WONG SIONG TUNG J
- C 18 MAY 2023
- D *Administrative Law — Judicial review — Application for — Applications for
judicial review against decisions of Deputy Director of the Inland Revenue and
Minister of Finance subjecting Labuan business activities not listed in Schedule to
Labuan Business Activity Tax (Requirements for Labuan Business Activity)
Regulations 2018 ('2018 Regulations'), as amended by Labuan Business Activity
Tax (Requirements For Labuan Business Activity) 2018 (Amendment) Regulations
2020 ('2020 Regulations') to income tax under Income Tax Act 1967 — Whether
2018 Regulations which was made by Deputy Prime Minister ultra vires and
invalid — Whether 2020 Regulations which amended 2018 Regulations invalid*
- E *— Whether there were substance requirements prescribed for business activity of
applicants — Whether there was specific provision to disqualify applicants to be
taxed under Labuan Business Activity Tax Act 1990 — Whether Labuan Business
Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 could
have retrospective effect to take away vested right of applicants — Whether
decisions adversely affected applicants — Whether applications for judicial review
were filed out of time — Income Tax Act 1967 s 3B — Labuan Business Activity
Tax Act 1990 ss 2, 2B(1)(a), (b), (2), 4 & 21 — Labuan Business Activity Tax
(Requirements for Labuan Business Activity) Regulations 2018 — Labuan
Business Activity Tax (Requirements for Labuan Business Activity) 2018
(Amendment) Regulations 2020 — Labuan Business Activity Tax (Requirements
for Labuan Business Activity) Regulations 2021 — Labuan Companies Act 1990*
- G
- H The applicants in the present case were companies incorporated in the Federal
Territory of Labuan under the Labuan Companies Act 1990. This case was in
relation to three judicial review applications filed by the applicants against the
decision made by the Minister of Finance ('the MOF') in his letter dated
1 April 2021 to the Association of Labuan Trust Companies ('the ALTC') ('the
MOF's decision') that endorsed and accepted the stance or position put forth
by the Deputy Director of the Inland Revenue Board ('the DGIR') in a letter
dated 5 February 2021, stating that Labuan business activities not listed in the
Schedule to the Labuan Business Activity Tax (Requirements for Labuan
Business Activity) Regulations 2018 ('the 2018 Regulations'), as amended by
the Labuan Business Activity Tax (Requirements for Labuan Business Activity)
- I

2018 (Amendment) Regulations 2020 ('the 2020 Regulations'), would automatically be subject to income tax under the Income Tax Act 1967 ('the ITA') and thus required to submit Tax Return Form ('ITRF') under the ITA ('the DGIR's decision'). Consequently, the applicants were no longer eligible for the lower tax rate of 3% on their chargeable profits under s 4 of the Labuan Business Activity Tax Act 1990 ('the LBATA'). The three judicial review applications which were heard together in the present case were part of 103 judicial review applications filed by the other applicants against the MOF's decision. These 103 applications for judicial review were tabulated under three different categories, namely category A, B and C. The three judicial review applications ('the three lead cases') presently heard by the court represented each of the said categories. The parties concerned in the said 103 judicial review applications had agreed that the decision of the court made in these three lead cases shall apply and bind all cases under respective categories. Following the filing of these judicial review applications, the MOF had passed the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 ('the 2021 Regulations') which came into force retrospectively on 1 January 2019. Based on the 2021 Regulations, the applicants in category A and B would fall within item 20 of the First Schedule of the said regulations retrospectively and the applicants in category C would fall under item 2 of the Second Schedule of the said regulations retrospectively, as such, in order for the applicants to be eligible for the lower tax rate of 3% under the LBATA for years of assessment 2019 and 2020, they were required to meet the prescribed substance requirements as set out in the 2021 Regulations. The issues arose were as followed: (a) the legality of the 2018 Regulations made by the Deputy Prime Minister and amended by the 2020 Regulations made by the MOF; (b) no substance requirements prescribed for the business activity of applicants and no specific provision to disqualify applicants to be taxed under the LBATA; (c) the 2021 Regulations could not have retrospective effect to take away the vested right of the applicants; (d) whether the impugned letters from the DGIR and MOF adversely affected the applicants; and (e) the applicants' applications filed out of time.

Held, quashing the decisions of the MOF and DGIR, granting a declaration that the 2018 Regulations and the 2020 Regulations were invalid in law, granting a declaration that the 2021 Regulations only applied prospectively and not retrospectively on the applicants, and allowing costs of RM25,000 for each of the applicants in the three judicial review applications and RM1,000 for each of the remaining applicants in the applications as listed under category A, B and C except for the applicant in LBN-25JR-4/3 of 2021:

- (1) The 2018 Regulations which first prescribed the substance requirements was made by the Deputy Prime Minister. However, pursuant to s 2 of the LBATA, the minister authorised to prescribe the substance requirements by regulations under s 2B(1)(b) of the LBATA was the minister for the

- A time being charged with the responsibility for finance, ie, the MOF. There were no provisions in the LBATA to empower or authorise the MOF or anybody to further sub-delegate the power to make regulations under ss 2B(1)(b) and 21 of the LBATA. Strictly construed, the 2018 Regulations were therefore ultra vires and invalid. That being the case,
- B the 2020 Regulations made by the MOF to amend the invalid 2018 Regulations had no effect too. It ought to be noted that in the hearing of the applicants' applications for judicial review, the applicants were not precluded from calling into question the legality of these regulations (see paras 50–51, 57 & 59–61).
- C (2) As the 2018 Regulations and the 2020 Regulations were not validly made, therefore, as at the time the DGIR and the MOF issued their letters, the applicants were Labuan entities as specified in the Schedule referred to under s 2B(1)(a) of the LBATA carried on Labuan business
- D activities without any substance requirements under s 2B(1)(b) lawfully prescribed by any valid regulations made and in force at the material times. Tax statutes had to be construed strictly. There must be clear and expressed provisions in the statutes to render a taxpayer liable to be
- E charged to tax. Any ambiguity in the provisions in the tax statutes in that respect had to be construed in favour of a taxpayer. That being the case, at the material times the applicants therefore, were only subject to be
- F charged to tax under s 4 of the LBATA and not under s 3B of the ITA. Considering the above findings, the letters by the DGIR and the MOF were therefore made without expressly authorised by the law and thus, in excess of authority (see paras 62–65).
- G (3) The court disagreed that the matters had become academic because of the making of the 2021 Regulations, particularly in view of the findings that the 2018 Regulations and the 2020 Regulations were invalid. Firstly, the respondents seemed to maintain the validity of their decisions made in their letters dated 5 February 2021 and 1 April 2021 respectively. Secondly, the 2021 Regulations were made to apply retrospectively with effect on 1 January 2019. To require the applicants to go back in time to
- H comply with the substance requirements retrospectively was a grave injustice to the applicants. The legislature could not have intended to confer such authority or power upon the MOF or delegate the authority or power to prescribe the Substance Requirement to apply retrospectively through the provisions of ss 2B(2) and 21 of LBATA for the purpose of making regulations. There was no express provision in the LBATA which
- I empowered the MOF to make regulations to apply retrospectively. The applicants had the vested rights as Labuan entities with business activities not required to satisfy any Substance Requirement and entitled to the benefit of being subjected to be charged to tax at a lower rate under the LBATA before the making of the 2021 Regulations. The 2021

Regulations could not take away the vested rights of the applicants. The 2021 Regulations applied only to the applicants prospectively (see paras 71–74, 77–78 & 81).

A

- (4) Based on the reasons as given in the court's grounds of decision dated 2 September 2021 in relation to the leave application for judicial review, the court maintained its finding that the action by the two letters of the respondents respectively had adversely affected the applicants and therefore amenable to judicial review (see para 85).

B

- (5) The court disagreed with the respondents' submission that the applications herein were filed out of time because the grounds for the applications first arose and were communicated when the 2018 Regulations were gazetted on 31 December 2018. Firstly, the impugned decisions or actions being challenged were the two letters dated 5 February 2021 and 1 April 2021 issued by the respondents respectively, which were based on the validity of the 2018 Regulations that the court had found to be invalid. The applicants were entitled to apply for judicial review of the decisions in or actions by the two impugned letters of the respondents respectively without first applying to set aside the 2018 Regulations on the ground of their invalidity. As previously held by the court, the applicants were not precluded from contending that the 2018 Regulations were invalid in their applications for judicial review (see paras 86–89).

C

D

E

[Bahasa Malaysia summary]

Pemohon-pemohon dalam kes ini adalah syarikat-syarikat yang diperbadankan di Wilayah Persekutuan Labuan di bawah Akta Syarikat Labuan 1990. Kes ini berkaitan dengan tiga permohonan semakan kehakiman yang difailkan oleh pemohon-pemohon terhadap keputusan yang dibuat oleh Menteri Kewangan ('MK') dalam suratnya bertarikh 1 April 2021 kepada Persatuan Syarikat Amanah Labuan (ALTC) ('keputusan MK') yang mengesahkan dan menerima pendirian atau kedudukan yang dikemukakan oleh Timbalan Pengarah Lembaga Hasil Dalam Negeri ('KPHDN') dalam surat bertarikh 5 Februari 2021, menyatakan bahawa aktiviti perniagaan Labuan yang tidak disenaraikan dalam Jadual kepada Peraturan-Peraturan Cukai Aktiviti Perniagaan Labuan (Kehendak Bagi Aktiviti Perniagaan Labuan) 2018 ('Peraturan 2018'), sebagaimana yang dipinda oleh Peraturan-Peraturan Cukai Aktiviti Perniagaan Labuan (Kehendak Bagi Aktiviti Perniagaan Labuan) 2018 (Pindaan) 2020 ('Peraturan 2020'), secara automatik akan tertakluk kepada cukai pendapatan di bawah Akta Cukai Pendapatan 1967 ('ACP') dan oleh itu dikehendaki menyerahkan Borang Nyata Cukai (BNC) di bawah ACP ('keputusan KPHDN'). Akibatnya, pemohon tidak lagi layak untuk kadar cukai yang lebih rendah sebanyak 3% ke atas keuntungan bercukai mereka di bawah s 4 Akta Cukai Aktiviti Perniagaan Labuan 1990 ('ACAPL'). Tiga permohonan semakan kehakiman yang

F

G

H

I

- A didengar bersama dalam kes ini adalah sebahagian daripada 103 permohonan
semakan kehakiman yang difailkan oleh pemohon-pemohon lain terhadap
keputusan MK. Kesemua 103 permohonan untuk semakan kehakiman ini
telah diletakkan di bawah tiga kategori berbeza, iaitu kategori A, B dan C. Tiga
permohonan semakan kehakiman ('tiga kes utama') yang didengar oleh
B mahkamah pada masa ini mewakili setiap kategori tersebut. Pihak-pihak yang
berkenaan dalam 103 permohonan semakan kehakiman tersebut telah
bersetuju bahawa keputusan mahkamah yang dibuat dalam tiga kes utama ini
hendaklah terpakai dan mengikat semua kes di bawah kategori masing-masing.
C Berikutan pemfailan permohonan semakan kehakiman ini, MK telah
meluluskan Peraturan-Peraturan Cukai Aktiviti Perniagaan Labuan
(Kehendak Bagi Aktiviti Perniagaan Labuan) 2021 ('Peraturan 2021') yang
berkuat kuasa secara retrospektif pada 1 Januari 2019. Berdasarkan Peraturan
2021, pemohon-pemohon dalam kategori A dan B akan termasuk dalam
D butiran 20 Jadual Pertama peraturan tersebut secara retrospektif dan
pemohon-pemohon dalam kategori C akan termasuk di bawah butiran 2
Jadual Kedua peraturan tersebut secara retrospektif, oleh itu, untuk
memastikan pemohon-pemohon layak mendapat kadar cukai yang lebih
rendah sebanyak 3% di bawah ACAPL bagi tahun taksiran 2019 dan 2020,
E mereka dikehendaki memenuhi Keperluan Fizikal yang ditetapkan dalam
Peraturan 2021. Isu-isu yang timbul adalah seperti berikut: (a) keabsahan
Peraturan 2018 yang dibuat oleh Timbalan Perdana Menteri dan dipinda oleh
Peraturan 2020 yang dibuat oleh MK; (b) tiada Keperluan Fizikal yang
ditetapkan untuk aktiviti perniagaan pemohon-pemohon dan tiada
F peruntukan khusus untuk membatalkan kelayakan pemohon-pemohon untuk
dikenakan cukai di bawah ACAPL; (c) Peraturan 2021 tidak boleh mempunyai
kesan retrospektif untuk mengambil hak kukuh pemohon-pemohon; (d) sama
ada surat-surat yang disangkal daripada KPHDN dan MK memberi kesan
buruk kepada pemohon; dan (e) permohonan pemohon-pemohon difailkan di
G luar masa yang ditetapkan.

- Diputuskan,** membatalkan keputusan MK dan KPHDN, memberikan
pengisytiharan bahawa Peraturan 2018 dan Peraturan 2020 adalah tidak sah di
sisi undang-undang, memberikan pengisytiharan bahawa Peraturan 2021
H hanya terpakai secara prospektif dan bukan retrospektif ke atas
pemohon-pemohon, dan membenarkan kos RM25,000 untuk setiap
pemohon dalam tiga permohonan semakan kehakiman dan RM1,000 bagi
setiap baki pemohon dalam permohonan-permohonan seperti yang
disenaraikan di bawah kategori A, B dan C kecuali pemohon dalam
I LBN-25JR-4/3 Tahun 2021:

- (1) Peraturan 2018 yang mula-mula menetapkan Keperluan Fizikal adalah
dibuat oleh Timbalan Perdana Menteri. Walau bagaimanapun, menurut
s 2 ACAPL, menteri yang diberi kuasa untuk menetapkan Keperluan
Fizikal mengikut peraturan di bawah s 2B(1)(b) ACAPL adalah menteri

- yang pada masa tersebut dipertanggungjawabkan dengan tanggungjawab untuk kewangan, iaitu MK. Tiada peruntukan dalam ACAPL untuk memberi kuasa atau membenarkan MK atau sesiapa sahaja untuk mewakilkan lagi kuasa untuk membuat peraturan di bawah ss 2B(1)(b) dan 21 ACAPL. Apabila ditafsirkan dengan tegas, maka Peraturan 2018 adalah ultra vires dan tidak sah. Oleh itu, Peraturan 2020 yang dibuat oleh MK untuk meminda Peraturan 2018 yang tidak sah juga tidak mempunyai kesan. Perlu diingat bahawa dalam pendengaran permohonan pemohon-pemohon untuk semakan kehakiman, pemohon-pemohon tidak dihalang daripada mempersoalkan keabsahan peraturan-peraturan ini (lihat perenggan 50–51, 57 & 59–61).
- (2) Memandangkan Peraturan 2018 dan Peraturan 2020 tidak dibuat secara sah, oleh itu, pada masa KPHDN dan MK mengeluarkan surat mereka, pemohon-pemohon adalah entiti Labuan seperti yang dinyatakan dalam Jadual yang dirujuk di bawah s 2B(1)(a) ACAPL yang menjalankan aktiviti perniagaan Labuan tanpa apa-apa keperluan fizikal di bawah s 2B(1)(b) yang ditetapkan secara sah oleh mana-mana peraturan sah yang dibuat dan berkuat kuasa pada masa yang material. Perundangan cukai perlu ditafsirkan dengan ketat. Perlu ada peruntukan yang jelas dan dinyatakan dalam statut untuk menyebabkan pembayar cukai bertanggungjawab dikenakan cukai. Apa-apa kekaburan dalam peruntukan statut cukai dalam hal tersebut perlu ditafsirkan memihak kepada pembayar cukai. Oleh itu, pada masa yang material, pemohon-pemohon hanya tertakluk kepada cukai di bawah s 4 ACAPL dan bukan di bawah s 3B ACP. Dengan mengambil kira dapatan di atas, surat oleh KPHDN dan MK telah dibuat tanpa kebenaran undang-undang dan dengan itu, melebihi kuasa (lihat perenggan 62–65).
- (3) Mahkamah tidak bersetuju bahawa perkara tersebut menjadi akademik kerana penggubalan Peraturan 2021, terutamanya memandangkan dapatan bahawa Peraturan 2018 dan Peraturan 2020 adalah tidak sah. Pertama, responden kelihatan mengekalkan keabsahan keputusan yang dibuat dalam surat mereka masing-masing bertarikh 5 Februari 2021 dan 1 April 2021. Kedua, Peraturan 2021 tersebut telah dibuat untuk diguna pakai secara retrospektif berkuat kuasa 1 Januari 2019. Menghendaki pemohon-pemohon kembali ke masa lalu untuk mematuhi Keperluan Fizikal secara retrospektif adalah satu ketidakadilan yang besar kepada pemohon-pemohon. Tidak mungkin badan perundangan berniat untuk memberikan kuasa kepada MK atau mewakilkan kuasa untuk menetapkan Keperluan Fizikal untuk digunakan secara retrospektif melalui peruntukan ss 2B(2) dan 21 ACAPL bagi tujuan membuat peraturan. Tiada peruntukan nyata dalam ACAPL yang memberi kuasa kepada MK untuk membuat peraturan-peraturan untuk digunakan secara retrospektif. Pemohon-pemohon mempunyai hak kukuh sebagai

- A entiti Labuan dengan aktiviti perniagaan yang tidak diperlukan untuk memenuhi apa-apa Keperluan Fizikal dan berhak mendapat faedah untuk dikenakan cukai pada kadar yang lebih rendah di bawah ACAPL sebelum Peraturan 2021 dibuat. Peraturan 2021 tidak boleh mengambil hak kukuh pemohon-pemohon. Peraturan 2021 terpakai hanya ke atas pemohon-pemohon secara prospektif (lihat perenggan 71–74, 77–78 & 81).
- B
- (4) Berdasarkan alasan-alasan seperti yang diberikan dalam alasan penghakiman mahkamah bertarikh 2 September 2021 berhubung permohonan kebenaran untuk semakan kehakiman, mahkamah mengekalkan keputusannya bahawa tindakan melalui kedua-dua surat responden-responden telah memberi kesan buruk kepada pemohon-pemohon dan oleh itu boleh disemak melalui semakan kehakiman (lihat perenggan 85).
- C
- D (5) Mahkamah tidak bersetuju dengan hujahan responden-responden bahawa permohonan-permohonan di sini difailkan di luar masa dengan alasan bahawa permohonan-permohonan tersebut mula timbul dan telah dimaklumkan apabila Peraturan 2018 diwartakan pada 31 Disember 2018. Pertamanya, keputusan atau tindakan yang disangkal yang dicabar ialah dua surat bertarikh 5 Februari 2021 dan 1 April 2021 yang dikeluarkan oleh responden-responden berdasarkan keabsahan Peraturan 2018 yang mahkamah dapati tidak sah. Pemohon-pemohon berhak memohon semakan kehakiman terhadap keputusan atau tindakan oleh dua surat responden-responden tersebut tanpa terlebih dahulu memohon untuk mengeneipkan Peraturan 2018 atas alasan ketidakabsahannya. Seperti yang diputuskan oleh mahkamah sebelum ini, pemohon-pemohon tidak dihalang daripada berhujah bahawa Peraturan 2018 adalah tidak sah dalam permohonan-permohonan mereka untuk semakan kehakiman (lihat perenggan 86-89).]
- E
- F
- G

Cases referred to

- Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)
- H *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773, FC (refd)
- Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99, SC (refd)
- I *Engineering Analysis Centre of Excellence Private Ltd v Commissioner of Income Tax and another* 23 ITLR 569. SC (refd)
- Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428, CA (refd)
- Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437, FC (refd)

<i>Ketua Pengarah Hasil Dalam Negeri v Malaysian Co-Operative Insurance Society Ltd</i> [2000] 1 MLJ 561, CA (refd)	A
<i>M Ratnavale v The Government of The Federation of Malaya</i> [1963] 1 MLJ 393 (refd)	
<i>Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri</i> [2006] 2 MLJ 498, CA (refd)	B
<i>National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue</i> [1994] 1 MLJ 99, SC (refd)	
<i>PP v Kit Chee Wan</i> [1999] 1 MLJ 16, HC (refd)	
<i>PP v Tan Kim Yong</i> [1997] MLJU 125; [1998] 1 CLJ 74, HC (refd)	
<i>Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri</i> [2018] 1 MLJ 376, CA (refd)	C
<i>State Public Service Commission, Sarawak v Sarjit Singh Khaira</i> [2000] 4 MLJ 353, FC (refd)	
<i>Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated</i> [2004] 2 MLJ 49, CA (refd)	D
<i>Lim Phin Khian v Kho Su Ming</i> [1996] 1 MLJ 1, FC (refd)	
<i>Loh Kooi Choon v Government of Malaysia</i> [1977] 2 MLJ 187, FC (refd)	
Legislation referred to	E
Finance Act 2018 ss 74, 76	
Finance Act 2019 s 71(2)	
Finance Act 2020	
Income Tax Act 1967	
Interpretation Acts 1948 and 1967 ss 8(2), 20, 30	F
Labuan Companies Act 1990	
Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018	
Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 First Schedule, Item 20, Second Schedule	G
Labuan Business Tax Activity Tax Act 1990 ss 2, 2(1), 2A, 2A(1), 2B, (1), (1)(a), (1)(b), (1A), (2), 3A, 3B, 4, 7, 21, 21(1)(a)	
Ministerial Functions Act 1969 s 2	
<i>Anand Raj (with Irene Yong, Foong Pui Chi, Yeoh Yu Xian and Analise Cheong) (Shearn Delamore & Co) for the applicant.</i>	H
<i>Mohd Hafzi bin Abdul Halim (with Fazriel Fardiansyah) (Federal Counsel, Attorney General's Chambers) for the first respondent.</i>	
<i>Mohammad Hafidz bin Ahmad (with Ahmad Isyak bin Mohd Hassan) (Inland Revenue Board Malaysia) for the second respondent.</i>	I

A Wong Siong Tung J:

INTRODUCTION

B [1] The three applications for judicial review, namely Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC); Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) and Application for Judicial Review No LBN-25-17/6 of 2021 (HC) were heard together.

C [2] There were 103 similar applications for judicial review by various parties. The applications for judicial review heard together were among three of them.

D [3] All the applicants in these 103 applications for judicial review were companies incorporated in the Federal Territory of Labuan under the Labuan Companies Act 1990 (Act 441).

E [4] All the applicants in these applications for judicial review were said to be adversely affected by the alleged decisions made by the Minister of Finance ('MOF') in his letter dated 1 April 2021.

F [5] They all concerned the legal issues arising from Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 (PU(A) 392/2018) and Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 (PU(A) 375/2020), particularly concerning the entitlement of these applicants to be charged a lower tax at 3% on their chargeable profits under s 4 of the Labuan Business Tax Activity Tax Act 1990 (Act 445).

G [6] These 103 applications for judicial review were tabulated under three different categories, namely category A, B and C as attached hereto.

H [7] The parties concerned have agreed that the three cases heard by the court together should be the lead cases for the three categories cases as listed respectively in the tabulation.

I [8] The parties concerned have agreed that the decision of the court made in these three lead cases shall apply and bind all cases under respective categories.

[9] On 2 September 2021, leave was granted to the applicants in the three lead cases to make application for judicial review for the reliefs as they prayed for.

[10] Thus, pursuant to the leave as granted, all the applicants in the three lead cases have filed their applications for judicial review which are heard together.

A

BRIEF BACKGROUNDS AND LEGISLATIVE CHANGES

B

[11] The Labuan Companies Act 1990 (Act 441) was enacted in 1990 to provide for the incorporation, registration and administration of Labuan companies and foreign Labuan companies and for matters connected therewith. It came into force on 1 October 1990.

C

[12] In the same year, the Labuan Offshore Business Activity Tax Act 1990 (Act 445) was enacted to provide for the imposition, assessment and collection of tax on a Labuan business activity carried on by a Labuan entity in or from Labuan and for matters connected therewith. It also came into force on 1 October 1990.

D

[13] Under the Labuan Offshore Business Activity Tax Act 1990 (Act 445), an offshore company as defined therein carrying on an offshore business activity which is an offshore trading activity can elect to pay tax at the rate of 3% of the net profit under s 4 of the said Act or to pay a flat tax of RM20,000 under s 7 of the said Act.

E

[14] The Offshore Companies Act 1990 (Act 441) was amended and renamed as Labuan Companies Act 1990 (Act 441) ('the LCA') by Offshore Companies (Amendment) Act 2010 (Act A1367) which came into effect on 11 February 2010.

F

[15] The Labuan Offshore Business Activity Tax Act 1990 (Act 445) was also amended and renamed as Labuan Business Activity Tax Act 1990 (Act 445) ('LBATA') by Labuan Offshore Business Activity Tax (Amendment) Act 2010 (Act A1366) which came into force on 11 February 2010.

G

[16] There were various amendments made to the LBATA subsequently.

H

[17] The s 76 of the Finance Act 2018 (Act 812) deleted s 7 of the LBATA, thus abolish the option to pay a flat tax of RM20,000 which by s 71(2) of the Finance Act 2019 (Act 823) comes into effect for the year of assessment 2020 and the years thereafter.

I

[18] The effect following the amendments made by the Finance Act 2018 (Act 812), and the Finance Act 2019 (Act 823) was that a Labuan entity engaged in Labuan business activity was subject to tax of 3% on its chargeable

A profits for the specified year of assessment under s 4 of the LBATA without the option to pay a flat tax of RM20,000.

B [19] Section 2A(1) of the LBATA then conferred on the MOF the power on the recommendation of the Director General in writing to designate any activity carried on by any Labuan entity as a Labuan business activity.

C [20] Section 2B(1) of the LBATA (which came into effect on 1 January 2019 as amended by s 74 of the Finance Act 2018 [Act 812],) then provided that:

(1) The Labuan entities —

- D** (a) shall be as specified in the Schedule; and
- (b) shall, for the purpose of the Labuan business activity, have —
 - (i) an adequate number of full time employees in Labuan; and
 - (ii) an adequate amount of annual operating expenditure in Labuan, as prescribed by the Minister by regulations made under this Act.

E (2) The Minister may, upon the recommendation of the Director General, by order published in the Gazette, amend the Schedule including for the purposes of declaring any other person as a Labuan entity.

[21] The Schedule of Labuan entity of LBATA is reproduced as follows:

F SCHEDULE

[Section 2B]

LABUAN ENTITY

- G** 1. *A Labuan company*
2. A Labuan foundation established and registered under the Labuan Foundations Act 2010 [Act]
3. A Labuan Islamic foundation established and registered under the Labuan Islamic Financial Services and Securities Act 2010
- H** 4. A Labuan Islamic partnership as defined in the Labuan Islamic Financial Services and Securities Act 2010
5. A Labuan limited partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010
- I** 6. A Labuan limited liability partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010
7. A Labuan Islamic trust as defined in the Labuan Islamic Financial Services and Securities Act 2010
8. A Labuan trust as defined in the Labuan Trusts Act 1996 [Act 554]

9. A Malaysian Islamic bank licensee as defined in the Labuan Islamic Financial Services and Securities Act 2010 A
10. A Malaysian bank licensee as defined in the Labuan Financial Services and Securities Act 2010
11. Any Labuan financial institutions as defined in the Labuan Financial Services Authority Act 1996 [Act 545] B
12. Any person declared by the Minister to be a Labuan entity under subsection 2B(2).

[22] It is indisputable that all the applicants in the three lead cases are Labuan companies as defined under s 2(1) of the LBATA and thus Labuan entities. C

[23] With the amendments introduced by the Finance Act 2018 (Act 812) (ie s 76) and the Finance Act 2019 (Act 823) (ie s 71(2)), though the Labuan entity no longer has the option to choose a flat tax rate RM20,000 for year of assessment for 2020 and the subsequent years, a Labuan entity however may under s 3A of the LBATA, elect to have its chargeable profits subjected to tax under the Income Tax Act 1967. Once the election is made, it becomes irrevocable. D
E

[24] On 31 December 2018, pursuant to s 21(1)(a) of the LBATA then read together with s 2B(1)(b) of the LBATA, the Deputy Prime Minister promulgated the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 (PU(A) 392/2018) ('the 2018 Regulations') which came into effect on 1 January 2019. F

[25] The 2018 Regulations provided a list of 21 of Labuan entities that carried out the different kinds of business activities as described and prescribed each of them with the minimum number of full time employees and the minimum amount of annual operating expenditure in Labuan ('substance requirements') for the purpose of the Labuan business activity of the Labuan entity as required under s 2B(1)(b) of the LBATA to entitle to be subjected to a lower tax at 3% on their chargeable profits under s 4 of the LBATA. G
H

[26] On 28 January 2020, the Labuan Business Activity Tax (Amendment) Act 2020 (Act A1614) was enacted and came into force on 10 February 2020 which further amended LBATA by inserting a new s 2B(1A) therein which provided that: I

2B(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 (Emphasis added.)

- A** [27] Section 1 of the Labuan Business Activity Tax (Amendment) Act 2020 [Act A1614] stipulated that the newly inserted s 2B(1A) in the LBATA would take effect from the year of assessment 2020 and the subsequent years if assessment.
- B** [28] On 23 December 2020, the MOF further made the Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 (PU(A) 375/2020) ('the 2020 Regulations').
- C** [29] The 2020 Regulations introduced changes to the substance requirements for specific items listed in the business activities of Labuan entities, as originally set out in the 2018 Regulations.
- D** [30] Among the amendments, item 22 was added to the list of business activities, specifically directed at Labuan entities that 'undertakes pure equity holding activities' and also prescribed the corresponding substance requirements.
- E** [31] Furthermore, the 2020 Regulations also provided that the provisions therein are deemed to have come into operation retrospectively on 1 January 2019.
- F** [32] On 31 December 2020, the Finance Act 2020 [Act 831] was enacted which further amended s 2B of the LBATA and rendered it to read as follows:
- G** 2B Labuan entity
- H** (1) The Labuan entities —
- I** (a) shall be as specified in the Schedule; and
- (b) shall, for the purposes of the Labuan business activity —
- (i) in relation to a Labuan trading activity —
(A) have an adequate amount of annual operating expenditure in Labuan,
(B) have an adequate number of full time employees in Labuan; and
as prescribed by the Minister by regulations made under this Act;
- (ii) in relation to a Labuan non-trading activity —
(A) have an adequate number of full time employees in Labuan;
(B) have an adequate amount of annual operating expenditure in Labuan; and
(C) comply with any condition in relation to control and management in Labuan,
as prescribed by the Minister by regulations made under this Act.
- [(1) Subs. Act 812: s.74; (b) Subs. Act 831:s.56]
- (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.* A
- [(1A) Ins. Act A1614: s.3]
- (1B) *For the purposes of subsection (1A) —* B
- (a) the chargeable profits shall be the net profits as reflected in the audited accounts in respect of such Labuan business activity of the Labuan entity for the basis period for that year of assessment; and
- (b) sections 6, 6A, 6B, 6C, 6D, 8 and 8A shall apply, with necessary modifications. C
- [(1B) Ins. Act 831: s.56]
- (2) *The Minister may, upon the recommendation of the Director General, by order published in the Gazette, amend the Schedule including for the purposes of declaring any other person as a Labuan entity.* D
- [2B. Ins. Act A1366: s.5]
- [33] There is no serious dispute that the applicants in Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC) (Category A) and in Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) (Category B) along with their respective business activities were not listed in the list of Labuan entities specified under the 2018 Regulations as amended by the 2020 Regulations. Essentially, their business activities did not fall within any of the 22 Labuan entities outlined in the 2018 Regulations, as amended by the 2020 Regulations. E
F
- [34] The applicants in the Application for Judicial Review No LBN-25–17/6 of 2021 (HC) (Category C) claimed that they were not listed among the 22 Labuan entities specified in the 2018 Regulation as amended by the 2020 Regulation and that their business activities, categorised as ‘Labuan non-trading activity’ were granted tax exemption by the Ministry of Finance (‘MOF’) under s 2A of the LBATA prior to the enactment of these regulations. G
- [35] Subsequently, the Deputy Director of the Inland Revenue Board issued a letter dated 5 February 2021 (exh TKS66 at p 6197–6214 of encl 4 in Judicial Review No LBN-25JR-75/5 of 2021) to the Association of Labuan Trust Companies (‘ALTC’), of which the applicants were members. In the letter, the Deputy Director of the Inland Revenue Board stated that the 2020 Regulations ‘has caused Labuan entity carrying on ‘Other Trading’ activities not to be included in the meaning of ‘Labuan Entity’ under sub-s 2B(1) of the Labuan Business Activity Tax Act (‘the LBATA’) 1990 and *are required to submit Tax Return Form (ITRF) under Income Tax Act 1967 (‘the ITA’).* H
I

A [36] In the aforementioned letter, the Deputy Director of the Inland Revenue also specified the deadlines for submitting the tax returns under the Income Tax Act 1967 ('the ITA 1967') for the year of assessment 2019 and subsequent years.

B [37] The Deputy Director of the Inland Revenue Board requested that the contents of the letter be disseminated to all members of the ALTC.

C [38] Thereafter, by a letter dated 1 April 2021 (exh TKS65 at pp 6192–6196 of encl 4 in Judicial Review No LBN-25JR-75/5 of 2021) written by MOF to ALTC the MOF responded to various earlier letters from ALTC regarding the position of Labuan entities not listed or specified with substance requirements under the 2020 Regulations. The MOF stated his position on the matter under item 2 in the tabulation in Lampiran 1 which is reproduced as follows:

D	Bil	Isu Berbangkit	Keputusan YB Menteri Kewangan
	1.	...	
E	2.	The clarification notes/pronouncement that were issued does not cover all the other trading entities such as general/good/trading/consultancy/ IT services etc.	Isu yang dibangkitkan tidak berbangkit
F		Labuan entities carrying on non-listed activities are to be taxed under ITA 1967 and not LBATA 1990 contrary to Malaysian Law and well-established taxing principles, and universally held taxation principles. Non listed activities would continue to be taxed under LBATA 1990 at 3% if the activities fall under the definition of 'Labuan Trading Activity'.	ALTC diminta untuk merujuk kepada perundangan yang sah di mana pronouncement yang dibuat oleh LFSA adalah tidak sah selagi mana ianya tidak diwartakan mengikut saluran perundangan.
H			Aktiviti general trading and services tidak dimasukkan sebagai salah satu aktiviti Labuan kerana aktiviti ini tidak termasuk dalam aktiviti Pusat Perniagaan dan Kewangan Antarabangsa Labuan.
I			

		Bagi aktiviti perniagaan yang tidak tersenarai adalah secara automatik tertakluk kepada pengenaan cukai pendapatan di bawah ACP 1967.	A
		Insentif galakan cukai untuk aktiviti perdagangan ada ditawarkan di bawah Akta Cukai Pendapatan 1967 melalui insentif percukaian Hab Prinsipal dan Syarikat Perdagangan Antarabangsa Malaysia (MITC) tertakluk kepada syarat yang ditetapkan.	B C D
3.	...		

[39] The MOF endorsed and accepted the stance or position put forth by the Deputy Director of the Inland Revenue Board, stating that Labuan business activities not listed in the Schedule to the 2018 Regulations, as amended by the 2020 Regulations, would automatically be subject to income tax under the ITA 1967 and thus required to submit Tax Return Form (ITRF) under Income Tax Act (the ITA) 1967. Consequently, the applicants were no longer eligible for the lower tax rate of 3% on their chargeable profits under s 4 of the LBATA.

[40] Thereafter, all the applicants filed the applications seeking leave to apply for judicial review of the decision as they contended made by the MOF in his letter dated 1 April 2021. On 2 September 2021, their applications for leave were granted.

[41] Following these developments, on 19 November 2021, the MOF made the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 ('the 2021 Regulations').

[42] The 2021 Regulations revoked and replaced the 2018 Regulations.

[43] The 2021 Regulations was made to come into operation or into force retrospectively on 1 January 2019.

[44] The 2021 Regulations by the First Schedule provided a list of 20 Labuan entities carrying on Labuan trading activities and prescribed the substance requirement for these entities.

A [45] Additionally, the 2021 Regulations by the Second Schedule, also provided two Labuan entities carrying on a Labuan non-trading activity along with their corresponding prescribed Substance Requirement.

B [46] Based on the 2021 Regulation, the applicants in Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC) (Category A); and in Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) (Category B) would fall within item 20 of the First Schedule of the 2021 Regulations retrospectively. In order to be eligible for the lower tax rate under LBATA for years of assessment ('YA') 2019 and 2020, they would be required to meet the prescribed substance requirements as set out in the 2021 Regulations.

[47] Item 20 of the First Schedule to the 2021 Regulations is reproduced as follows:

D FIRST SCHEDULE
[Regulation 2 and 4]

E	(1) No.	(2) Labuan entity carrying on a Labuan trading activity	(3) Minimum number of full time employees in Labuan	(4) Minimum amount of annual operating expenditure in Labuan (RM)
	...			
F	20	Labuan entity that carries on any one or more of the following business activity: (a) administrative services; (b) accounting services; (c) legal services; (d) backroom processing services; (e) payroll services; (f) talent management services; (g) agency services; (h) insolvency related services; (i) management services other than Labuan company management under item 17	2	50,000

I [48] Based on the 2021 Regulations, the applicants in Application for Judicial Review No LBN-25-17/6 of 2021 (HC) (Category C) would fall and be categorized under item 2 of the Second Schedule thereunder. Retrospectively, they would be required to meet the substance requirements prescribed for item 2 in order to be eligible for the lower tax rate of 3% under the LBATA for the years of assessment (YA) 2019 and 2020.

[49] Item 2 of the Second Schedule to the 2021 Regulations is also reproduced as follows:

FIRST SCHEDULE

[Regulation 2 and 4]

(1) No.	(2) Labuan entity carrying on a Labuan non-trading activity	(3) Minimum number of full time employees in Labuan	(4) Minimum amount of annual operating expenditure in Labuan (RM)
2	Labuan entity that undertakes pure equity holding activities	Exempted under the Labuan Business Activity Tax (Exemption) Order 2020 [P.U. (A) 177/2020]	20,000.00

THE LEGALITY OF THE 2018 REGULATIONS MADE BY DEPUTY PRIME MINISTER AND AMENDED BY THE 2020 REGULATIONS MADE BY THE MINISTER OF FINANCE

[50] The 2018 Regulations which first prescribed the substance requirements was made by the Deputy Prime Minister.

[51] However, by s 2 of the LBATA, the Minister authorised to prescribe the substance requirements by regulations under s 2B(1)(b) of the LBATA is the Minister for the time being charged with the responsibility for finance, meaning the Minister having control and responsibility with the matter, who is the Minister of Finance.

[52] By s 8(2) of the Interpretation Acts 1948 and 1967 provides that:

8 References to 'the High Court', 'the Minister' and 'the Treasury'

- (1) ...
- (2) A reference to 'the Minister' is a reference to the Minister for the time being responsible for the matter in connection with *which the reference is made*.
- (3) ... (Emphasis added.)

[53] Section 2 of the Ministerial Functions Act 1969 provides:

2 Functions, styles and titles of Ministers

- (1) The Yang di-Pertuan Agong may by order notify in the Gazette —
 - (a) *that a Minister has been conferred with any functions or has been*

- A *charged with any responsibility in respect of a particular department or subject or that any transfer, to any other Minister, of any of the functions or responsibility referred to has been made;*
- B (b) *that any style or title has been assigned to any Ministers (except the Prime Minister) or that any change in any style and title referred to has been made.*
- (2) *An order made by the Yang di-Pertuan Agong under this section —*
- C (a) *may provide for the transfer of any property, rights or liabilities held, enjoyed or incurred by any Minister in connection with any functions conferred or transferred; and*
- (b) *may contain such other provisions as may be necessary or expedient for the purpose of giving effect to the order.*
- D [54] It seems that there is no order of notification in the *Gazette* by the Yang di-Pertuan Agong conferring or designating the Deputy Prime Minister with the functions and responsibility for the country's finance during the time when the 2018 Regulations were enacted by the Deputy Prime Minister.
- E [55] In accordance with the maxim *delegatus non potest delegare*, a statutory power must be exercised only by the body or officer on whom it has been conferred, unless sub-delegation of the power is authorised by express words or necessary implication.
- F See: *State Public Service Commission, Sarawak v Sarjit Singh Khaira* [2000] 4 MLJ 353 (FC); *Public Prosecutor v Kit Chee Wan* [1999] 1 MLJ 16 and *M Ratnavale v The Government of The Federation of Malaya* [1963] 1 MLJ 393
- G [56] Statutory provisions in respect of sub-delegation are strictly construed.
- See: *M Ratnavale v The Government of the Federation of Malaya*.
- H [57] There is no provisions in LBATA to empower or authorise the Minister of Finance or anybody to further sub-delegate the power to make regulations under ss 2B(1)(b) and 21 of the LBATA.
- [58] The power conferred upon the Minister of Finance to make regulations to prescribe the substance requirements under ss 2B(1)(b) and 21 of the LBATA cannot be further sub-delegated to any other persons.
- I See: *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162

[59] Strictly construed, the 2018 Regulations are therefore ultra vires and invalid.

A

See: *Public Prosecutor v Tan Kim Yong* [1997] MLJU 125; [1998] 1 CLJ 74.

[60] That being the case, the 2020 Regulations made by the Minister of Finance to amend the 2018 Regulations which was not validly made at the first place, has no effect too.

B

[61] In the hearing of their applications for judicial review, the applicants are not precluded from calling into question, the legality of these regulations

C

See: *Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49.

D

NO SUBSTANCE REQUIREMENTS PRESCRIBED FOR THE BUSINESS ACTIVITY OF APPLICANTS AND NO SPECIFIC PROVISION TO DISQUALIFY APPLICANTS TO BE TAXED UNDER LBATA

E

[62] As the 2018 Regulations and 2020 Regulations were not validly made, as at the time the Deputy Director of Inland Revenue Board issued the impugned letter dated 5 February 2021 (exh TKS66, at p 6197–6214 of encl 4 in Judicial Review No LBN-25JR-75/5 of 2021) and at the time the MOF issued the letter impugned letter dated 1 April 2021, the applicants were Labuan entities as specified in the Schedule referred to under s 2B(1)(a) of the LBATA carried on Labuan business activities without any substance requirements under s 2B(1)(b) lawfully prescribed by any valid regulations made and in force at the material times.

F

G

[63] Tax statutes have to be construed strictly. There must be clear and expressed provisions in the statutes to render a taxpayer liable to be charged to tax. Any ambiguity in the provisions in the tax statutes in that respect has to be construed in favour of a taxpayer.

H

See: *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 (CA), *Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99 at 104 (SC) and *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 at 106 (SC).

I

[64] That being the case, at the material times the applicants therefore, were only subject to be charged to tax under s 4 of the LBATA and not under ITA by

A s 3B thereunder.

[65] That being the case, the letter dated 5 February 2021 issued by the DGIR relying on the invalid 2018 Regulations and requiring the applicants to submit the Tax Return Form under ITA to be charged to tax thereunder and the letter dated 1 April 2021 of the MOF which decided to the effect that the applicants were subject to the imposition of income tax under the ITA were made without expressly authorised by the law and therefore in excess of authority.

[66] The senior federal counsels for the respondents have not submitted otherwise.

THE 2021 REGULATIONS CANNOT HAVE RETROSPECTIVE EFFECT TO TAKE AWAY THE VESTED RIGHT OF THE APPLICANTS

[67] The senior federal counsels for the respondents submitted that the applicants' applications for judicial review have become academic because of the making of the 2021 Regulations by the MOF on 19 November 2021 gazetted as PU (A) 423/2021.

[68] The 2021 Regulations seems to provide a comprehensive list of the applicable Labuan business activities of Labuan entity under LBATA and prescribed with the substance requirements which covered the business activities of all the applicants to take effect retrospectively on 1 January 2019, going back some two years in time, which the applicants have to comply so as not to be subject to the higher tax under ITA.

[69] The senior federal counsels submitted that the applicants' issues were resolved and that the applications for judicial review have been overtaken by the 2021 Regulations.

[70] They submitted that 'the factual substratum underlying the question of the case has ceased' and relying on the Federal Court decision in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773. They submitted that the applicants' applications for judicial review should be withdrawn by the applicants if not, dismissed.

[71] I do not agree that the matters have become academic, particularly in view of the findings that the 2018 Regulations and the 2020 Regulations were invalid.

[72] Firstly, the respondents seemed to maintain the validity of their decisions made in their letters dated 5 February 2021 and 1 April 2021 respectively. A

[73] Secondly, the 2021 Regulations were made to apply retrospectively with effect on 1 January 2019. B

[74] The applicants have the vested rights as Labuan entities with business activities not required to satisfy any substance requirement and entitled to the benefit of being subjected to be charged to tax at a lower rate under LBATA before the making of the 2021 Regulations. C

[75] It is certainly impossible for all the applicants now to go back in time to 2019 to fulfil the substance requirements as prescribed by the 2021 Regulations, in order to avoid being subject to a higher tax rate under the Income Tax Act (the ITA). D

[76] I also noted the submission of the federal counsels for the respondents that the tax regime under LBATA is based on preceding Year basis and not current year basis as under ITA. E

[77] To require the applicants to go back in time to comply with the substance requirements retrospective is a grave injustice to the applicants. The Legislature could not have intended to confer such authority or power upon the MOF or delegate the authority or power to prescribe the substance requirement to apply retrospectively through the provisions of ss 2B(2) and 21 of the LBATA for the purpose of making regulations. F

See: *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (FC) G

[78] There is no express provision in LBATA which empowers the MOF to make regulations to apply retrospectively.

[79] For the purposes of delegated legislative provisions, the authority delegated to legislate by regulations has no power to legislate by the regulations to apply retrospectively so as to take away the vested rights of the citizens unless authorised expressly or by necessary implication by the parent Act, that is LBATA in this case. H

See: *Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437 (FC) and *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC). I

[80] Section 20 of the Interpretation Acts 1948 and 1967 has to be narrowly

A and strictly construed not to take away the vested rights of the applicants and subject to s 30 of the same Act.

See: *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 (SC); *Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437 (FC); *Ketua Pengarah Hasil Dalam Negeri v Malaysian Co-Operative Insurance Society Ltd* [2000] 1 MLJ 561 (CA); *Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49 (CA); *Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498 (CA); *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376 (CA); and *Engineering Analysis Centre of Excellence Private Ltd v Commissioner of Income Tax and another* 23 ITLR 569

D [81] The 2021 Regulations made by MOF cannot take away the vested rights of the applicants. The 2021 Regulations has to be construed to apply and I hold that they apply only to the applicants prospectively.

WHETHER THE LETTERS OF DGIR AND MOF IMPUGNED ADVERSELY AFFECTED THE APPLICANTS

E [82] The learned Senior Federal Counsels for the respondents again submitted that the applicants were not ‘adversely affected’ by the impugned letters issued by the DGIR and the MOF respectively as those letters were merely expressions of opinion or understanding of the DGIR and MOF respectively.

G [83] They further contended that the applicants had not submitted any tax returns or documentation to the Inland Revenue Board of Malaysia, and that no assessment or decision had been made by the DGIR regarding each individual applicant.

H [84] These arguments were raised by the learned senior federal counsels during the leave application for judicial review by the applicants, and they were within their rights to raise them again during the substantive hearing of the applications for judicial review.

I [85] After considering the submissions of the learned senior federal counsels, the learned counsels for the applicants and revisiting the issues raised in relation to these matters, for the reasons as given in my grounds of decision dated 2 September 2021 granting the applicants leave for judicial review, I maintain my finding that the decisions if not, the action by two letters of the respondents respectively adversely affected the applicants and therefore amendable to judicial review.

THE APPLICANTS' APPLICATION FILED OUT OF TIME

A

[86] The learned senior federal counsels for the respondents submitted that the applications herein were out of time by contending that the grounds for the applications first arose and were communicated when the 2018 Regulations were *gazetted* on 31 December 2018.

B

[87] I respectfully disagree with this submission. Firstly, the impugned decisions or actions being challenged are the two letters dated 5 February 2021 and 1 April 2021 issued by the respondents respectively, which were based on the validity of the 2018 Regulations that I have found to be invalid.

C

[88] The applicants are entitled to apply for judicial review of the decisions in or actions by the two impugned letters of the respondents respectively without first applying to set aside the 2018 Regulations on the ground of their invalidity.

D

[89] As I have previously held, the applicants are not precluded from contending that the 2018 Regulations were invalid in their applications for judicial review.

E

PRONOUNCEMENT AND ORDERS.

[90] In the premises, in respect Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC); Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) and Application for Judicial Review No LBN-25-17/6-2021 (HC), I granted the applicants therein, the following orders:

F

- (a) an order of certiorari that the decision of the first respondent contained in his letter dated 5 February 2021 be removed into this court and quashed;
- (b) an order of certiorari that the decision of the second defendant contained in his letter dated 1 April 2021 be removed into this court and quashed;
- (c) a declaration that the 2018 Regulations and the 2020 Regulations are invalid in law; and
- (d) a declaration that for the purpose to be charged to tax by the 1st Respondent, the 2021 Regulations only applies, operates and has effect on the applicants prospectively as from the date of its making (ie 19 November 2021) and has no retrospective operation, effect and application upon the applicants prior to the date of its making.

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A [91] The applicants in these three applications for judicial review are entitled to costs which I allow in the sum of RM25,000 for each of the three applications.

B [92] Pursuant to the agreement between the parties, I grant similar orders in favour of the other applicants in their applications as listed under respective Category A, B and C tabulated (except applicant in LBN-25JR-4/3 of 2021 — Palmsphere (L) Bhd (item no 3)) and as attached hereto with costs of RM1,000 for each of the applications.

C ATTACHMENT

Category A – “Code 23” cases
(DGIR’s Decision of 5.2.2021 & MOF’s Decision of 1.4.2021)

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company’s documents	Common correspondence		
1.	LBN-25JR-1/3-2021 AFG International Inc.	23.3.2021	√	1-5	6-8 (same)	X	N/A
2.	LBN-25JR-2/3-2021 Skin Fitness Inc.	23.3.2021	√	1-6	7-9 (same)	X	N/A
3.	LBN-25JR-4/3-2021 Palmsphere (L) Bhd	30.3.2021	√	1-7	8-10 (same)	X	N/A
4.	LBN-25JR-5/4-2021 Troop London Inc.	1.4.2021	√	1-5	6-8 (same)	X	N/A
5.	LBN-25JR-6/4-2021 World Liner Inc.	1.4.2021	√	1-6	7-9 (same)	X	N/A
6.	LBN-25JR-7/4-2021 Marketa Limited	1.4.2021	√	1-4	5-7 (same)	X	N/A
7.	LBN-25JR-8/4-2021 Libbaq Consultancy Limited	5.4.2021	√	1-6	7-10 (same)	X	N/A
8.	LBN-25JR-9/4-2021 WW Galaxy Ltd.	5.4.2021	√	1-5	6-10 (same)	X	N/A
9.	LBN-25JR-10/4-2021 ISStudy Inc.	6.4.2021	√	1-5	6-8 (same)	X	N/A
10.	LBN-25JR-11/4-2021 International Awards Associate Inc.	7.4.2021	√	1-5	6-8 (same)	X	N/A
11.	LBN-25JR-12/4-2021 Dragonfly Tech Solution Ltd	9.4.2021	√	1-5	6-8 (same)	X	N/A
12.	LBN-25JR-13/4-2021 Goodrich Co. Ltd.	12.4.2021	√	1-5	6-10 (same)	X	N/A
13.	LBN-25JR-14/4-2021 Sakco Metals Ltd	13.4.2021	√	1-2	3-5 (same)	X	N/A
14.	LBN-25JR-15/4-2021 Maverick Mavens Limited	13.4.2021	√	1-6	7-9 (same)	X	N/A
15.	LBN-25JR-16/4-2021 9Media Online Inc.	13.4.2021	√	1-5	6-10 (same)	X	N/A
16.	LBN-25JR-17/4-2021 Bernhard Schulte Shipmanagement (L) Limited	13.4.2021	√	1-5	6-9 (same)	X	N/A
17.	LBN-25JR-19/4-2021 Alba Ltd	14.4.2021	√	1-5	6-8 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
18.	LBN-25JR-20/4-2021 Aegis International Ltd	15.4.2021	√	1-3	4-6 (same)	X	N/A
19.	LBN-25JR-21/4-2021 Galaxy Services Corporation	15.4.2021	√	1-5	6-10 (same)	X	N/A
20.	LBN-25JR-22/4-2021 Valiant Capital Corp.	15.4.2021	√	1-5	6-10 (same)	X	N/A
21.	LBN-25JR-23/4-2021 Abraxas Limited	16.4.2021	√	1-5	6-10 (same)	X	N/A
22.	LBN-25JR-24/4-2021 Piranha Ltd	16.4.2021	√	1-5	6-8 (same)	X	N/A
23.	LBN-25JR-25/4-2021 Southern Cross International Ltd	16.4.2021	√	1-5	6-8 (same)	X	N/A
24.	LBN-25JR-26/4-2021 Firstfloor CCII Limited	19.4.2021	√	1-6	7-11 (same)	X	N/A
25.	LBN-25JR-27/4-2021 Affinity Ltd	19.4.2021	√	1-5	6-8 (same)	X	N/A
26.	LBN-25JR-28/4-2021 Amberley Asia Ltd	19.4.2021	√	1-5	6-8 (same)	X	N/A
27.	LBN-25JR-29/4-2021 Asia Global Exim Ltd	20.4.2021	√	1-5	6-8 (same)	X	N/A
28.	LBN-25JR-30/4-2021 Lotus Capital Corp.	20.4.2021	√	1-5	6-9 (same)	X	N/A
29.	LBN-25JR-31/4-2021 Quasar Technology Pte. Ltd.	20.4.2021	√	1-6	7-11 (same)	X	N/A
30.	LBN-25JR-32/4-2021 Mega Resources Private Limited & Mega Mineral Pte Ltd	20.4.2021	√	1-10	11-14 (same)	X	N/A
31.	LBN-25JR-33/4-2021 Goldhill International Limited	20.4.2021	√	1-4	5-8 (same)	X	N/A
32.	LBN-25JR-35/4-2021 WA Pro Logistics Co Ltd	21.4.2021	√	1-3	4-6 (same)	X	N/A
33.	LBN-25JR-36/4-2021 SG Labuan Limited	22.4.2021	√	1-5	6-10 (same)	X	N/A
34.	LBN-25JR-38/4-2021 Dominion Global Corp.	22.4.2021	√	1-9	10-14 (same)	X	N/A
35.	LBN-25JR-39/4-2021 Dubor Asia Ltd.	22.4.2021	√	1-5	6-10 (same)	X	N/A
36.	LBN-25JR-40/4-2021 Direct Wave Ltd	22.4.2021	√	1-5	6-8 (same)	X	N/A

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No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
37.	LBN-25JR-41/4-2021 Global Assets Limited	23.4.2021	√	1-6	7-10 (same)	X	N/A
38.	LBN-25JR-42/4-2021 Ultimate Limited	23.4.2021	√	1-6	7-11 (same)	X	N/A
39.	LBN-25JR-43/4-2021 Infinitum Ltd	23.4.2021	√	1-2	3-5 (same)	X	N/A
40.	LBN-25JR-44/4-2021 Karl Spark Inc.	23.4.2021	√	1-3	4-6 (same)	X	N/A
41.	LBN-25JR-45/4-2021 KPG Synergy Ltd	26.4.2021	√	1-3	4-6 (same)	X	N/A
42.	LBN-25JR-46/4-2021 Ramsi Shipping & Trading Limited	26.4.2021	√	1-5	6-10 (same)	X	N/A
43.	LBN-25JR-47/4-2021 Jagrow Incorporated	26.4.2021	√	1-5	6-10 (same)	X	N/A
44.	LBN-25JR-48/4-2021 Images In Motion (L) Inc.	27.4.2021	√	1-5	6-8 (same)	X	N/A
45.	LBN-25JR-49/4-2021 Teiway Ltd	29.4.2021	√	1-6	7-11 (same)	X	N/A
46.	LBN-25JR-50/4-2021 Grand Rich Inc.	29.4.2021	√	1-6	7-11 (same)	X	N/A
47.	LBN-25JR-51/4-2021 Finwave Limited	29.4.2021	√	1-5	6-10 (same)	X	N/A
48.	LBN-25JR-52/4-2021 Executive Ship Management Limited & Executive Ship Management (P) Limited	29.4.2021	√	1-11	12-16 (same)	X	N/A
49.	LBN-25JR-53/4-2021 C-Quest Capital Stoves Asia Ltd, Ecogas Asia Limited & C-Quest Capital LED Asia Ltd	29.4.2021	√	1-11	12-16 (same)	X	N/A
50.	LBN-25JR-54/5-2021 Global Engineering Services Limited	3.5.2021	√	1-5	6-7 (same)	X	N/A
51.	LBN-25JR-55/5-2021 Blue Roots Ltd.	3.5.2021	√	1-5	6-10 (same)	X	N/A
52.	LBN-25JR-56/5-2021 Flextronics Marketing (L) Ltd, Flextronics Mechanicals Marketing (L) Ltd, Flextronics Sales & Marketing	3.5.2021	√	1-10	11-15 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRR?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
	North Asia (I) Ltd and Flextronics Industries Marketing (L) Ltd						
53.	LBN-25JR-57/5-2021 Gryphon International Inc	3.5.2021	√	1-5	6-10 (same)	X	N/A
54.	LBN-25JR-58/5-2021 Mascot Ltd.	3.5.2021	√	1-6	7-11 (same)	X	N/A
55.	LBN-25JR-59/5-2021 Mechanical & Electrical Consulting Services Ltd.	3.5.2021	√	1-4	5-9 (same)	X	N/A
56.	LBN-25JR-60/5-2021 Silverknows CMB Ltd	3.5.2021	√	1-5	6-10 (same)	X	N/A
57.	LBN-25JR-61/5-2021 Ouya Trading Ltd. & Grafix and Koko Co. Ltd	3.5.2021	√	1-11	12-16 (same)	X	N/A
58.	LBN-25JR-62/5-2021 Samling Elegant Living Trading (Labuan) Limited	3.5.2021	√	1-6	7-10 (same)	X	N/A
59.	LBN-25JR-63/5-2021 Ange Capital Ltd.	3.5.2021	√	1-5	6-10 (same)	X	N/A
60.	LBN-25JR-64/5-2021 Naga Securities (Engineering and Consulting) Co Ltd	3.5.2021	√	1-4	5-9 (same)	X	N/A
61.	LBN-25JR-65/5-2021 Securitech Engineering (Asia) S.A.	3.5.2021	√	1-4	5-9 (same)	X	N/A
62.	LBN-25JR-66/5-2021 Xanex Limited	4.5.2021	√	1-5	6-8 (same)	X	N/A
63.	LBN-25JR-67/5-2021 TPT Management Ltd & Emunah Limited	4.5.2021	√	1-10	11-13 (same)	X	N/A
64.	LBN-25JR-68/5-2021 Persatuan Syarikat-Syarikat Amanah Labuan (Association of Labuan Trust Companies) & 16 others	4.5.2021	√	1	2-24 (same)	X	N/A
65.	LBN-25JR-69/5-2021 Pomona Limited	4.5.2021	√	1-5	6-10 (same)	X	N/A
66.	LBN-25JR-70/5-2021 Maga Jeff Mining Holding Co Ltd	4.5.2021	√	1-5	6-10 (same)	X	N/A
67.	LBN-25JR-71/5-2021 KTMJ Co., Ltd.	4.5.2021	√	1-4	5-7 (same)	X	N/A

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No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U. (A) 392/2018, P.U. (A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
68.	LBN-25JR-72/5-2021 Core4u International Ltd	4.5.2021	✓	1-4	5-9 (same)	X	N/A
69.	LBN-25JR-73/5-2021 Worldwide Trading Ltd	4.5.2021	✓	1-5	6-9 (same)	X	N/A
70.	LBN-25JR-75/5-2021 Bright World Trading Co Ltd & 62 others	4.5.2021	✓	1-63	64-66 (same)	X	N/A
71.	LBN-25JR-76/5-2021 Tristar Global Limited	4.5.2021	✓	1-6	7-11 (same)	X	N/A
72.	LBN-25JR-77/5-2021 Macworld Industries Limited	4.5.2021	✓	1-6	7-11 (same)	X	N/A
73.	LBN-25JR-78/5-2021 Bumi Armada (Labuan) Ltd & Bumi Armada Navigation Labuan Limited	4.5.2021	✓	1-9	10-14 (same)	X	N/A
74.	LBN-25JR-79/5-2021 PKT Global Logistics (Labuan) Ltd	4.5.2021	✓	1-5	6-10 (same)	X	N/A
75.	LBN-25JR-80/5-2021 Arom Grips Ltd	4.5.2021	✓	1-5	6-10 (same)	X	N/A
76.	LBN-25JR-81/5-2021 Asset Opportunities Ltd.	4.5.2021	✓	1-5	6-10 (same)	X	N/A
77.	LBN-25-1/6-2021 Dyson Sphere Inc.	4.6.2021	✓	1-5	6-10 (same)	X	N/A
78.	LBN-25-2/6-2021 Bernhard Schulte Shipmanagement (L) Limited	10.6.2021	✓	1-5	6-12 (same)	X	N/A
79.	LBN-25-3/6-2021 Big Apple Agency, Inc	10.6.2021	✓	1-5	6-10 (same)	X	N/A
80.	LBN-25-4/6-2021 Anglo-Eastern (Labuan) Limited	10.6.2021	✓	1-4	5-10 (same)	X	N/A
81.	LBN-25-5/6-2021 Five Stones Inc Limited	10.6.2021	✓	1-4	5-10 (same)	X	N/A
82.	LBN-25-6/6-2021 Linbaq Consultancy Limited	14.6.2021	✓	1-6	7-12 (same)	X	N/A
83.	LBN-25-7/6-2021 Xeraya Capital Labuan Ltd	14.6.2021	✓	1-4	5-11 (same)	X	N/A
84.	LBN-25-8/6-2021 DavMar Consulting Limited	14.6.2021	✓	1-4	5-10 (same)	X	N/A
85.	LBN-25-9/6-2021 World Liner Inc.	15.6.2021	✓	1-6	7-12 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
86.	LBN-25-10/6-2021 MLSCF Management (Labuan), LLP	15.6.2021	√	1-4	5-11 (same)	X	N/A
87.	LBN-25-11/6-2021 AFG International Inc.	15.6.2021	√	1-5	6-12 (same)	X	N/A
88.	LBN-25-14/6-2021 Troop London Inc.	15.6.2021	√	1-5	6-11 (same)	X	N/A
89.	LBN-25-15/6-2021 9Media Online Inc.	15.6.2021	√	1-5	6-12 (same)	X	N/A
90.	LBN-25-16/6-2021 Maverick Mavens Limited	16.6.2021	√	1-6	7-11 (same)	X	N/A
91.	LBN-25-18/6-2021 C Global Trade and Investment, Inc. and CCT-CBI Global Management, Inc.	16.6.2021	√	1-8	9-15 (same)	X	N/A
92.	LBN-25-19/6-2021 Marketa Limited	16.6.2021	√	1-4	5-10 (same)	X	N/A
93.	LBN-25-20/6-2021 Skin Fitness Inc.	16.6.2021	√	1-6	7-13 (same)	X	N/A
94.	LBN-25-21/6-2021 WW Galaxy Ltd.	16.6.2021	√	1-5	6-12 (same)	X	N/A
95.	LBN-25-22/6-2021 Universal Resources Ltd	16.6.2021	√	1-4	5-9 (same)	X	N/A

**Category B – Cases not falling under Codes 1 to 23
(DGIR's Decision of 5.2.2021 & MOF's Decision of 1.4.2021)**

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
96.	LBN-25JR-18/4-2021 *FTE International Ltd & Forestry Timber Flooring International Ltd	14.4.2021	√	1-10	11-15 (same)	X	N/A
97.	LBN-25JR-34/4-2021 Interselect N. V.	20.4.2021	√	1-5	6-8 (same)	X	N/A
98.	LBN-25JR-37/4-2021 Alfa Trading Limited	22.4.2021	√	1-5	6-10 (same)	X	N/A
99.	LBN-25JR-74/5-2021 LKC Maritime Ltd & LKC International Ltd	4.5.2021	√	1-2	3-5 (same)	X	N/A
100.	LBN-25-12/6-2021 Mirai Inc.	15.6.2021	√	1-4	5-10 (same)	X	N/A
101.	LBN-25-13/6-2021 Logii Inc.	15.6.2021	√	1-4	5-10 (same)	X	N/A

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**Category C – Code 21 made to apply retrospectively
(MOF’s Decision of 1.4.2021)**

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No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company’s documents	Common correspondence		
102.	LBN-25JR-3/3-2021 ExxonMobil Services (Labuan) Limited	23.3.2021	√	1-6	7-9 (same)	X	N/A
103.	LBN-25-17/6-2021 ExxonMobil Services (Labuan) Limited	16.6.2021	√	1-6	7-13 (same)	X	N/A

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Order accordingly.

Reported by Dzulqarnain Ab Fatar

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23 Disember 2021
23 December 2021
P.U. (A) 466

WARTA KERAJAAN PERSEKUTUAN

*FEDERAL GOVERNMENT
GAZETTE*

PERINTAH CUKAI AKTIVITI PERNIAGAAN LABUAN
(PENGECCUALIAN) 2020 (PINDAAN) 2021

*LABUAN BUSINESS ACTIVITY TAX (EXEMPTION) 2020
(AMENDMENT) ORDER 2021*

DISIARKAN OLEH/
PUBLISHED BY
JABATAN PEGUAM NEGARA/
ATTORNEY GENERAL'S CHAMBERS

LABUAN BUSINESS ACTIVITY TAX ACT 1990

LABUAN BUSINESS ACTIVITY TAX (EXEMPTION) 2020 (AMENDMENT) ORDER 2021

IN exercise of the powers conferred by subsection 26(1) of the Labuan Business Activity Tax Act 1990 [*Act 445*], the Minister makes the following order:

Citation and commencement

1. (1) This order may be cited as the **Labuan Business Activity Tax (Exemption) 2020 (Amendment) Order 2021**.

(2) This Order is deemed to have come into operation on 1 January 2021.

Amendment of paragraph 2

2. The Labuan Business Activity Tax (Exemption) Order 2020 [*P.U. (A) 177/2020*] is amended in paragraph 2 by substituting for the words “subparagraph 2B(1)(b)(i)” the words “subsubparagraph 2B(1)(b)(ii)(A)”.

Made 20 December 2021

[MOF.TAX (S) 700-2/1/76; PN(PU2)491/IV]

TENGGU DATUK SERI UTAMA ZAFRUL BIN TENGGU ABDUL AZIZ
Minister of Finance

[To be laid before the Dewan Rakyat pursuant to subsection 26(2) of the Labuan Business Activity Tax Act 1990]

APPENDIX 4A



INLAND REVENUE BOARD MALAYSIA

**RESIDENCE STATUS OF COMPANIES
AND BODIES OF PERSONS**

PUBLIC RULING NO. 5/2011

Translation from the original Bahasa Malaysia text

DATE OF ISSUE: 16 MAY 2011



RESIDENCE STATUS OF COMPANIES AND BODIES OF PERSONS

INLAND REVENUE BOARD MALAYSIA

Public Ruling No. 5/2011
Date of Issue: 16 May 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 provides an explanation on the determination of the residence status of companies and bodies of persons.
2. The provisions of the Income Tax Act 1967 (ITA 1967) related to this Ruling are section 8 and subsection 61(3).
3. The words used in this Ruling have the following meaning:
 - 3.1 “Body of persons” means an unincorporated body of persons (not being a company), including a co-operative society, a club, an association, a trust and a Hindu Joint Family but excluding a partnership.
 - 3.2 “Non-resident” means other than a resident in Malaysia by virtue of section 8 and subsection 61(3) of the ITA 1967.
 - 3.3 “Hindu Joint Family” means what in any system of law prevailing in India is known as a Hindu Joint Family or coparcenary.
 - 3.4 “Person” includes a company, a body of persons and a corporation sole.
 - 3.5 “Resident” means resident in Malaysia by virtue of section 8 and subsection 61(3) of the ITA 1967.
 - 3.6 “Company” means a body corporate and includes any body of persons established with a separate legal entity by or under the laws of a territory outside Malaysia.
4. **Significance Of Residence Status**
 - 4.1 Residence status is a question of fact and it is one of the main criteria that determines the tax treatment and tax consequences of a company or body of persons.
 - 4.2 A resident and a non-resident company in Malaysia is taxed in the same manner in respect of any gains or profits accrued in or derived from Malaysia.
 - 4.3 The distinct differences in the tax treatment of a resident and non-resident company are as follows:

Item	Resident	Non-Resident
Scope of charge	a) Companies carrying on business of banking, insurance, shipping and air transport – income is taxable on a world	Income accrued in or derived from Malaysia.

	income scope. b) Other companies – income accrued in or derived from Malaysia.	
Business income	Taxable if deemed derived from Malaysia.	Taxable on business income accruing in or derived from Malaysia if there is a permanent establishment in Malaysia.
Derivation of dividends	Dividends distributed by a resident company are deemed derived from Malaysia. With the introduction of the single-tier system with effect from 1.1.2008, single-tier dividends are exempt from tax in Malaysia. However, franked dividends derived from Malaysia are still subject to Malaysian tax. Beginning from 1.1.2014, all dividends distributed by a resident company are exempt from tax in Malaysia.	Dividends distributed by a non-resident company are not deemed derived from Malaysia.
Section 108 ITA 1967 account to franked dividends	A resident company is required to deduct tax under section 108 ITA 1967 from dividends deemed derived from Malaysia under the imputation system. With the introduction of the single tier system which is fully implemented on companies from 1.1.2014, section 108 ITA 1967 is not applicable. However, during the	Not applicable.

	transitional period from 1.1.2008 to 31.12.2013, companies with a credit balance in their section 108 ITA 1967 accounts at 31.12.2007 are allowed to utilise these credits to pay franked dividends to shareholders up to and including 31.12.2013.	
Able to enjoy tax treaty benefits	Applicable.	Applicable.
Double taxation relief	Applicable.	Not applicable.
Incentives available under ITA 1967 and Promotion of Investment Act 1986	Applicable.	Not applicable.
Tax rates	1) As specified in paragraph 2 of part 1, Schedule 1, ITA 1967. 2) Tax rate for companies with a paid up capital of RM2.5 million and less at the beginning of the basis period (as provided under paragraph 2A of part 1, Schedule 1, ITA 1967) is as follows: i) for every ringgit of the first RM500,000 - 20%; and ii) for every ringgit exceeding RM500,000 - 25% (with effect from year	As specified in paragraph 2 of part 1, Schedule 1, ITA 1967.

	of assessment 2009). However, pursuant to paragraph 2B of part 1, Schedule 1, ITA 1967 which was introduced with effect from the year of assessment 2009, a company will not qualify for the above preferential tax rates if more than 50% of the paid up capital in respect of ordinary shares of – a) that company is owned directly or indirectly by a related company; b) the related company is owned directly or indirectly by that company; or c) that company and the related company is owned directly or indirectly by another company. Related company means a company whose paid up capital in respect of ordinary shares exceeds RM2.5 million at the beginning of the basis period for a year of assessment. 3) The tax rate applicable for an insurer from inward re-insurance business or offshore insurance business is as specified in paragraph 3, part 1 of Schedule 1, ITA 1967.	
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	4) The tax rate applicable for a life fund other than income arising from life re-insurance business and inward life re-insurance business, of a resident or non-resident insurer is as specified in part VIII of Schedule 1, ITA 1967. 5) The tax rate applicable for a family fund referred to in section 60AA of the ITA 1967 other than income arising from family solidarity re-takaful business and inward family solidarity re-takaful business, of a resident or non-resident operator is as specified in part XII of Schedule 1, ITA 1967.	
Withholding tax	Not applicable.	Certain receipts may be subject to withholding tax such as: i) Interest¹ (except as exempted) (withholding tax under section 109 of the ITA 1967 – final tax at the rate as specified in part II of Schedule 1, ITA 1967); ii) Royalties¹ (withholding tax under section 109 of the ITA 1967– final tax at the rate as specified in part II of Schedule 1, ITA 1967); iii) Special classes of

		income¹ under section 4A of the ITA 1967 (withholding tax under section 109B of the ITA 1967 – final tax at the rate as specified in part V of Schedule 1, ITA 1967); iv) Service portion of contract payments (withholding tax under section 107A of the ITA 1967); v) Distribution of income from a Real Estate Investment Trust¹ (REITs) exempted under section 61A of the ITA 1967 (withholding tax under section 109D of the ITA 1967 – final tax at the rate as specified in part X of Schedule 1, ITA 1967); vi) Distribution of income of a family fund, family re-takaful or general fund under section 60AA of the ITA 1967 (withholding tax under section 109E of the ITA 1967 at the rate as specified in part XI of Schedule 1, ITA 1967); and vii) Other income¹ falling under paragraph 4(f) of the ITA 1967 (withholding tax under section 109F of the ITA 1967 – final tax at the rate as specified in part
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		XIII of Schedule 1, ITA 1967).
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¹Reference has to be made to the relevant agreements for the avoidance of double taxation for any variation in tax rates, if applicable.

- 4.4 The distinct differences in the tax treatment of resident and non-resident bodies of persons are as follows:

Category	Resident	Non-Resident
Hindu Joint Family	Personal relief of RM9,000 can be claimed. Taxed at scale rates which are applicable to resident individuals in accordance with paragraph 1 of part I, Schedule 1, ITA 1967.	Personal relief is not applicable. Taxed in accordance with the general provisions of the ITA 1967 applicable to non-residents and at the rate of tax as specified in paragraph 1A of part 1, Schedule 1, ITA 1967.
Trade Association	Income tax exemption is applicable to the statutory income derived from members' subscription fees. Taxed at scale rates which are applicable to resident individuals in accordance with paragraph 1 of part 1, Schedule 1, ITA1967.	Income tax exemptions are not applicable. Taxed in accordance with the general provisions of the ITA 1967 applicable to non-residents and at the rate of tax as specified in paragraph 1A of part 1, Schedule 1, ITA 1967.
Trust Body	Tax rate is as specified in paragraph 2, part I of Schedule 1, ITA 1967.	Taxed in accordance with the general provisions of the ITA 1967 applicable to non-residents and at the rate of tax as specified in paragraph 1A of part 1, Schedule 1, ITA 1967.
Co-operative Societies	Taxed at scale rates which are applicable to a Co-operative Society as	Taxed in accordance with the general provisions of the ITA 1967 applicable to

	specified in part IV of Schedule 1, ITA 1967.	non-residents and at the rate of tax is as specified in paragraph 1A of part 1, Schedule 1, ITA 1967.
Clubs, Association, Societies	Taxed at scale rates which are applicable to resident individuals in accordance with paragraph 1 of part I, Schedule 1, ITA 1967.	Taxed in accordance with the general provisions of the ITA 1967 applicable to non-residents and the rate of tax is as specified in paragraph 1A of part 1, Schedule 1, ITA 1967.

5. Determination Of Residence Status Of Companies Or Bodies Of Persons

Companies and bodies of persons must meet certain criteria to be considered a resident in Malaysia. Section 8 of the ITA 1967 provides for the determination of residence status in respect of companies and bodies of persons (except trust bodies) whereas subsection 61(3) of the ITA 1967 provides for the determination of residence status of a trust body.

5.1 Residence status of a Hindu Joint Family

Pursuant to paragraph 8(1)(a) of the ITA 1967, a Hindu Joint Family is resident in Malaysia for the basis year for a year of assessment if the manager or karta is resident for that basis year. As such, if the manager or karta is a non-resident, the Hindu Joint Family is deemed a non-resident in Malaysia.

5.2 Companies or bodies of persons carrying on a business

Pursuant to paragraph 8(1)(b) of the ITA 1967, a company or a body of persons (not being a Hindu Joint Family) carrying on a trade or business is resident in Malaysia for the basis year for a year of assessment if at any time during the basis year the management and control (as explained in paragraph 5.5 of this Ruling) of its business or of any one of its businesses are exercised in Malaysia.

Example 1

Jet Ltd, a company incorporated in Hong Kong has businesses in Hong Kong, Singapore and Malaysia. All the businesses of the company are managed and controlled by the head office in Hong Kong except for a brief period in the year 2008 when the management and control was exercised in Malaysia. This is because one of the board of directors meeting was held in Kuala Lumpur, where important policy decisions were made, on 28.6.2008 which falls in the basis year for the year of assessment 2008.

Jet Ltd is resident in Malaysia for the basis year for the year of assessment 2008 as the management and control which involved important policy making decisions was exercised in Malaysia in 2008. Therefore the income derived from the business carried on in Malaysia is subject to tax in Malaysia for the year of assessment 2008.

Note: If the company is not a resident in Malaysia, it would still be taxable on its income derived from Malaysia. Non-resident companies and persons other than resident companies carrying on the business of banking, insurance or sea or air transport are exempted from tax on income derived from sources outside Malaysia and received in Malaysia.

Example 2

Simon Inc., was incorporated in the USA on 2.1.2000 and shortly after its incorporation, it registered as a foreign company in Malaysia on 2.3.2000. Simon Inc. (Malaysia) then commenced the business of provision of management and consultancy services in Malaysia. Its revenue was largely from fees charged for management, consultancy and other services provided to a related company, Simon (Malaysia) Sdn Bhd.

The Board of Directors of Simon Inc. (Malaysia) comprised of an American citizen who held the post of the president and 4 Malaysians who held the posts of a general manager, director (2 persons) and an accountant. However, the management and control of Simon Inc. (Malaysia) has been carried on in the USA since incorporation by the board of directors in the USA.

The financial accounting period of Simon Inc. (Malaysia) is the calendar year. The company claimed to be a resident in Malaysia in the year of assessment 2008 as the board of directors meeting was held in Kuala Lumpur on 30.11.2008. An audit finding indicated that a board of directors meeting was not held on the said date but a promotional and marketing session was held instead.

Since a board of directors meeting was not held in Malaysia on 30.11.2008, the management and control of the company was not exercised in Malaysia in the year of assessment 2008. Therefore, Simon Inc. (Malaysia) is not a resident in Malaysia for the year of assessment 2008.

5.3 Any other company or body of persons

Pursuant to paragraph 8(1)(c) of the ITA 1967, any other company or body of persons (not being a Hindu Joint Family) is resident in Malaysia for the basis year for a year of assessment if at any time during the basis year the management and control (as explained in paragraph 5.5 of this Ruling) of its affairs are exercised in Malaysia by its directors or other controlling authority, e.g. a board of management / directors. As for investment holding companies, the management and control of its affairs includes the management and important decisions in respect of investments.

Example 3

Smart Holdings Sdn Bhd (SHSB), an investment holding company was incorporated in Malaysia on 2.1.2006. SHSB is wholly owned by Smart Holding Ltd, the holding company in the British Virgin Islands. This holding company is wholly owned by Smart Construction Holding Ltd, the ultimate holding company in Bermuda.

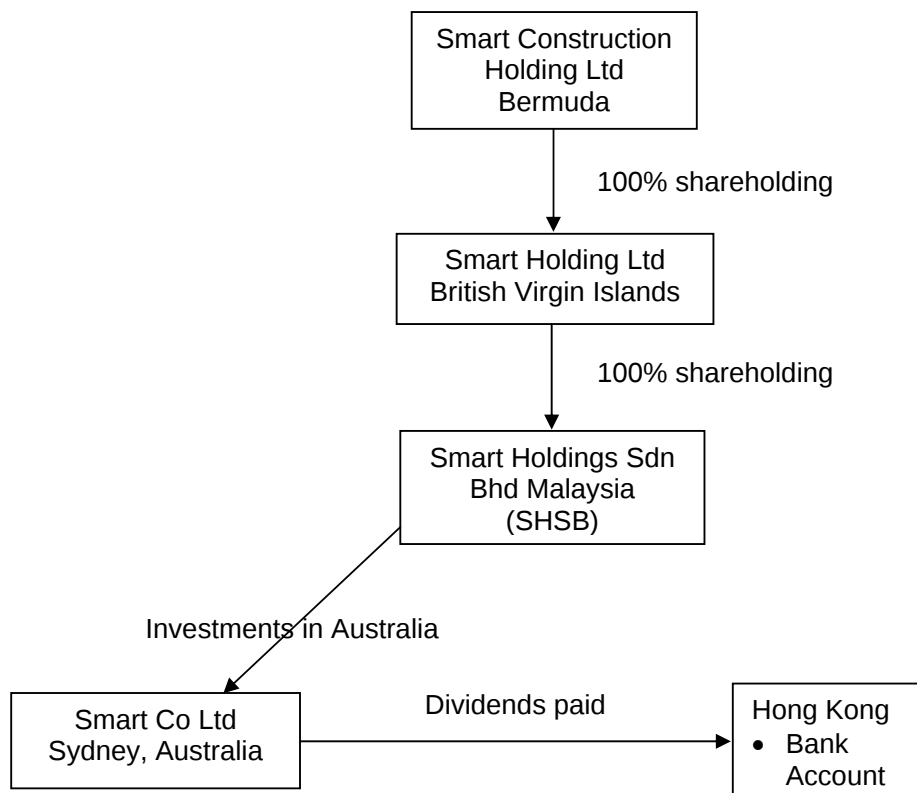
The board of directors of SHSB comprises of 7 directors, 5 of whom are citizens and residents of Hong Kong while the remaining 2 are Malaysians. The board of directors meetings are held in both Hong Kong and Malaysia. The meetings that were held in Hong Kong were only attended by the 4 directors from Hong Kong who have vast experience in investment and finance. Meetings were also held in Malaysia but were attended by the 2 Malaysian directors and communication with the directors from Hong Kong were through video conferencing and telephone. From the minutes of the meetings, it was noted that all decisions regarding investments, share management, finance and administration of SHSB were resolved in Hong Kong by the 4 directors in Hong Kong. The meetings held in Malaysia merely reported what had been decided in Hong Kong.

SHSB does not have a business premise in Malaysia. Its dividend income is from investments in an Australian company, Smart Co. Ltd in Sydney and interest income is from fixed deposits in various countries. None of SHSB's income has been remitted to Malaysia. SHSB does not have a bank account in Malaysia and all its income has been remitted to a bank account in Hong Kong.

SHSB claimed to be a resident in Malaysia from the year of assessment 2006 onwards as the management and control of its affairs were exercised in Malaysia by its directors.

Note: If SHSB is a tax resident of Malaysia, the dividend income from Australia should be subject to tax at 15% on gross in accordance with Article 10 of the Avoidance of Double Taxation Agreement between Malaysia and Australia instead of the 30% tax rate levied by the Australian Tax Authorities based on the Australian domestic tax laws.

The above situation can be summarised as follows:



Although SHSB claimed that there were board of directors meeting held in Malaysia but the meetings were not related to policy decisions that had to be followed by SHSB. All the decisions relating to investments, share management, finance and administration were made by the directors in Hong Kong at the board of directors meeting held in Hong Kong. As such, the management and control of the affairs of SHSB are not considered exercised in Malaysia and SHSB is not a tax resident of Malaysia from the year of assessment 2006.

5.4 Residence status of a subsidiary or a branch of a foreign company in Malaysia

Foreign corporations normally extend their business activities to Malaysia by incorporating a subsidiary in Malaysia or registering a branch in Malaysia. The residence status of subsidiaries of foreign corporations would be determined by paragraphs 8(1)(b) and 8(1)(c) of the ITA 1967. Branches of foreign corporations in Malaysia are generally treated as non-residents in Malaysia unless it can be established that the management and control of its

affairs or of its businesses or of any one of its businesses is exercised in Malaysia.

5.5 Management and control

- (i) Management and control is the key factor used to ascertain the residence status of a company in Malaysia. The management and control refers to the controlling authority which determines the policies to be followed by the company. The management and control is considered to be exercised where the directors meet to conduct the company's business / affairs irrespective of where the company might be incorporated. The management and control of a business of a company would depend upon how the business is managed.

If, at any time during the basis year for a year of assessment at least one meeting of the board of directors is held in Malaysia concerning the management and control of the company, even though all other meetings are held outside Malaysia, then the company is resident in Malaysia for that basis year.

Example 4

The facts are the same as in Example 1.

The management and control is considered exercised in Malaysia on 28.6.2008 when the board of directors held their meeting in Kuala Lumpur. Although only one board of directors meeting was held in Malaysia in the year of assessment 2008, Jet Ltd. is considered a resident in Malaysia as the management and control was exercised in Malaysia in the basis year for the year of assessment 2008.

- (ii) The location of the trading activities or the place of physical operations may not necessarily be the place of management and control. A company engaged in trading activities in Malaysia will not be resident in Malaysia if it is found that not only the trading activities, e.g. manufacturing or producing and selling are controlled abroad but also that the meetings of the shareholders and directors, at which all its important affairs are conducted and controlled, are also held abroad.

Example 5

Ching Mart Stores Inc. is a Chinese retail store dealing with luxury products in China. It has set up a business in Kuala Lumpur that deals with trading activities but the management and control is exercised by the parent company in China.

Although the physical operations of the company was carried on in Malaysia but the management and control of the company was exercised outside Malaysia. Therefore, the company is not a resident in Malaysia.

- (iii) The appointment of a local director or local board of directors in Malaysia does not determine the residence status of a company. If the controlling authority is exercised by the directors who are at the company's head office overseas, then the company is not a resident in Malaysia.

Example 6

The facts are the same as in Example 2 except that the two local directors from Malaysia are not involved with policy decisions that control and direct the company. The 2 directors merely perform formal functions delegated by the controlling directors who are in the USA.

Although two local directors from Malaysia have been appointed to be on the board of directors but the policies and decisions are all made by the board of directors at the head office in USA. Therefore, the management and control is not exercised in Malaysia and the company is not a resident in Malaysia.

- (iv) Control by the directors determines the management and control of a company. The directors exercise their powers in the management of the company's affairs by virtue of the powers conferred upon them under the Articles of Association. On the other hand, control by the shareholders is not relevant for the determination of the management and control as share-holders exercise their power over the company by virtue of their voting power at formal meetings of shareholders.
- (v) The residence status of a director does not determine the residence status of a company.

5.6 Residence status of trust bodies

Pursuant to subsection 61(3) of the ITA 1967, a trust body is deemed a resident in Malaysia for the basis year for a year of assessment only if any trustee of the trust is a resident in that basis year. However, a trust body will not be regarded as a resident if:

- (i) the trust was created outside Malaysia by a person or persons who were not citizens;
- (ii) the income of that trust body for that basis year is wholly derived from outside Malaysia;

- (iii) the trust is administered for the whole of that basis year outside Malaysia; and
- (iv) at least one-half of the number of the member trustees are not resident in Malaysia for that basis year.

6. Residence Status To Continue Once Established

Pursuant to subsection 8(2) of the ITA 1967, when it has been established by the Director General of the Inland Revenue Board Malaysia that a company is resident in Malaysia for a given year of assessment, that company is considered a resident in Malaysia for each subsequent year of assessment until the contrary is proved.

Example 7

Rich Ltd, a company incorporated in Taiwan has its business in Taiwan, Singapore and Malaysia. The financial accounting year of the company is 30 June. All major decisions affecting the company are made at the Board of Directors meetings, all of which are held in Taiwan except for one which is held in Kuala Lumpur on 15.5.2009.

As there was one Board of Directors Meeting held in Kuala Lumpur on 15.5.2009, the management and control is considered exercised in Malaysia and the company is resident in Malaysia for the year of assessment 2009. It will continue to be considered a resident in Malaysia for the year of assessment 2010 and subsequent years of assessment until the the contrary is proved.

7. Dual Residence Status And Agreements For The Avoidance Of Double Taxation (DTA)

- 7.1 Malaysia has entered into agreements with a number of countries that avoid double taxation by allocating taxing rights over bilateral income flows between the respective treaty partners.
- 7.2 Dual residence is avoided between Malaysia and countries with which Malaysia has tax treaties. These treaties provide a tie-breaker residence article to determine a single country of residence. The provision of the tie breaker varies from treaty to treaty.
- 7.3 The Article on residence is normally Article 4 of the DTA which states the test for residence and the tie breaker for dual residence. The tie breaker test in an agreement provides that a dual resident be treated solely as a resident of the treaty partner country for purposes of the agreement. The terms of the relevant DTA should be referred to when determining tax liability. However, Malaysian resident status is still applicable for purposes of the general application of the domestic law, so that the income of companies and bodies of persons remain assessable to Malaysian tax.

8. Required Documentation To Determine The Residence Status Of a Company

When trading and management and control are exercised outside Malaysia but certain directors' meetings are held in Malaysia, the following documentation may assist to determine the company's residence status:

- (i) Articles and Memorandum of Association to ascertain where the company is registered and whether or not there are any provisions regarding residence in the articles;
- (ii) if the articles do give a place of management and control, whether the articles are being implemented;
- (iii) the company's letter head;
- (iv) minutes of directors' meetings that indicates where the meetings were held and what decisions relating to management and control were taken; and
- (v) minutes of general meetings that shows where such meetings have been held and what transpired at these meetings.

9. 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.**



24 Disember 2020
24 December 2020
P.U. (A) 376

WARTA KERAJAAN PERSEKUTUAN

FEDERAL GOVERNMENT GAZETTE

KAEDAH-KAEDAH CUKAI PENDAPATAN
(PEMOTONGAN YANG TIDAK DIBENARKAN BAGI
PEMBAYARAN KEPADA SYARIKAT LABUAN OLEH
PEMASTAUTIN) 2018 (PINDAAN) 2020

*INCOME TAX (DEDUCTIONS NOT ALLOWED FOR
PAYMENT MADE TO LABUAN COMPANY BY RESIDENT)
RULES 2018 (AMENDMENT) 2020*

DISIARKAN OLEH/
PUBLISHED BY
JABATAN PEGUAM NEGARA/
ATTORNEY GENERAL'S CHAMBERS

INCOME TAX ACT 1967

INCOME TAX (DEDUCTIONS NOT ALLOWED FOR PAYMENT MADE TO LABUAN COMPANY
BY RESIDENT) RULES 2018 (AMENDMENT) 2020

IN exercise of the powers conferred by paragraphs 39(1)(r) and 154(1)(b) of the Income Tax Act 1967 [*Act 53*], the Minister makes the following rules:

Citation and commencement

1. (1) These rules may be cited as the **Income Tax (Deductions Not Allowed for Payment Made to Labuan Company by Resident) Rules 2018 (Amendment) 2020**.

(2) These Rules are deemed to have come into operation on 1 January 2019 except for rule 2 which comes into operation on 1 January 2021.

Amendment of rule 2

2. The Income Tax (Deductions Not Allowed for Payment Made to Labuan Company by Resident) Rules 2018 [*P.U. (A) 375/2018*] which is referred to as the “principal Rules” in these Rules, are amended—

(a) by renumbering the existing rule 2 as subrule 2(1); and

(b) by inserting after the renumbered subrule 2(1) the following subrule:

“(2) For the purpose of these Rules, “Labuan company” means a Labuan entity referred to in paragraph 2B(1)(a) of the Labuan Business Activity Tax Act 1990 [*Act 445*].”.

Amendment of Schedule

2. The Schedule to the principal Rules is amended—

(a) by substituting for the heading of the Schedule the following heading:

“

(1)	(2)	(3)
<i>No.</i>	<i>Type of payment</i>	<i>Amount not allowed for deduction</i> ”;

(b) in item 1, under column (3), by substituting for the words “33% of the amount of payment” the words “25% of the amount of payment (including payment in connection with financing in respect of commission, facility fee and advance fee)”; and

(c) in item 2, under column (3), by substituting for the words “33%” the words “25%”.

Made 23 December 2020

[Perb: MOF.TAX (S) 700-2/1/76; PN(PU2)80/C]

DATO’ SRI TENGKU ZAFRUL BIN TENGKU ABDUL AZIZ
Minister of Finance

[To be laid before the Dewan Rakyat pursuant to subsection 154(2) of the Income Tax Act 1967]



24 Disember 2020
24 December 2020
P.U. (A) 376

WARTA KERAJAAN PERSEKUTUAN

*FEDERAL GOVERNMENT
GAZETTE*

KAEDAH-KAEDAH CUKAI PENDAPATAN
(PEMOTONGAN YANG TIDAK DIBENARKAN BAGI
PEMBAYARAN KEPADA SYARIKAT LABUAN OLEH
PEMASTAUTIN) 2018 (PINDAAN) 2020

*INCOME TAX (DEDUCTIONS NOT ALLOWED FOR
PAYMENT MADE TO LABUAN COMPANY BY RESIDENT)
RULES 2018 (AMENDMENT) 2020*

DISIARKAN OLEH/
PUBLISHED BY
JABATAN PEGUAM NEGARA/
ATTORNEY GENERAL'S CHAMBERS

INCOME TAX ACT 1967

INCOME TAX (DEDUCTIONS NOT ALLOWED FOR PAYMENT MADE TO LABUAN COMPANY
BY RESIDENT) RULES 2018 (AMENDMENT) 2020

IN exercise of the powers conferred by paragraphs 39(1)(r) and 154(1)(b) of the Income Tax Act 1967 [*Act 53*], the Minister makes the following rules:

Citation and commencement

1. (1) These rules may be cited as the **Income Tax (Deductions Not Allowed for Payment Made to Labuan Company by Resident) Rules 2018 (Amendment) 2020**.

(2) These Rules are deemed to have come into operation on 1 January 2019 except for rule 2 which comes into operation on 1 January 2021.

Amendment of rule 2

2. The Income Tax (Deductions Not Allowed for Payment Made to Labuan Company by Resident) Rules 2018 [*P.U. (A) 375/2018*] which is referred to as the “principal Rules” in these Rules, are amended—

(a) by renumbering the existing rule 2 as subrule 2(1); and

(b) by inserting after the renumbered subrule 2(1) the following subrule:

“(2) For the purpose of these Rules, “Labuan company” means a Labuan entity referred to in paragraph 2B(1)(a) of the Labuan Business Activity Tax Act 1990 [*Act 445*].”.

Amendment of Schedule

2. The Schedule to the principal Rules is amended—

(a) by substituting for the heading of the Schedule the following heading:

“

(1)	(2)	(3)
<i>No.</i>	<i>Type of payment</i>	<i>Amount not allowed for deduction</i> ”;

(b) in item 1, under column (3), by substituting for the words “33% of the amount of payment” the words “25% of the amount of payment (including payment in connection with financing in respect of commission, facility fee and advance fee)”; and

(c) in item 2, under column (3), by substituting for the words “33%” the words “25%”.

Made 23 December 2020

[Perb: MOF.TAX (S) 700-2/1/76; PN(PU2)80/C]

DATO’ SRI TENGKU ZAFRUL BIN TENGKU ABDUL AZIZ
Minister of Finance

[To be laid before the Dewan Rakyat pursuant to subsection 154(2) of the Income Tax Act 1967]



27 Disember 2021
27 December 2021
P.U. (A) 482

WARTA KERAJAAN PERSEKUTUAN

*FEDERAL GOVERNMENT
GAZETTE*

PERATURAN-PERATURAN CUKAI AKTIVITI
PERNIAGAAN LABUAN (KEHENDAK BAGI SYARIKAT
PERDAGANGAN KOMODITI ANTARABANGSA
LABUAN) 2021

*LABUAN BUSINESS ACTIVITY TAX (REQUIREMENTS FOR
LABUAN INTERNATIONAL COMMODITY TRADING
COMPANY) REGULATIONS 2021*

DISIARKAN OLEH/
PUBLISHED BY
JABATAN PEGUAM NEGARA/
ATTORNEY GENERAL'S CHAMBERS

LABUAN BUSINESS ACTIVITY TAX ACT 1990

LABUAN BUSINESS ACTIVITY TAX (REQUIREMENTS FOR LABUAN INTERNATIONAL
COMMODITY TRADING COMPANY) REGULATIONS 2021

IN exercise of the powers conferred by paragraph 21(1)(a) read together with paragraph 2B(1)(b) of the Labuan Business Activity Tax Act 1990 [Act 445], the Minister makes the following regulations:

Citation and commencement

1. (1) These regulations may be cited as the **Labuan Business Activity Tax (Requirements for Labuan International Commodity Trading Company) Regulations 2021**.

(2) Subregulation 3(1) is deemed to have come into operation on 1 January 2019 until 31 December 2020.

(3) Subregulations 3(2) and 3(3) are deemed to have come into operation on 1 January 2021.

Interpretation

2. (1) In these Regulations, unless the context otherwise requires—

“qualifying activity” means the trading of physical products and related derivative instruments in relation to—

- (a) petroleum and petroleum-related products including liquefied natural gas;
- (b) minerals;
- (c) agriculture products;
- (d) refined raw materials;
- (e) chemicals;
- (f) base minerals; or
- (g) coal;

“Global Incentives for Trading” means a programme of incentives for a Labuan International Commodity Trading Company to use Malaysia as its international trading base to undertake a qualifying activity;

“Labuan International Commodity Trading Company” means a Labuan company which—

- (a) is incorporated or registered under the Labuan Companies Act 1990 [Act 441];
- (b) is licensed under section 92 of the Labuan Financial Services and Securities Act 2010 [Act 704];
- (c) maintains a registered office in Labuan but is allowed to establish its business operational office anywhere in Malaysia; and
- (d) undertakes a qualifying activity under the Global Incentives for Trading programme;

“related companies” means companies that are deemed to be related to each other in accordance with of section 4 of the Labuan Companies Act 1990.

Requirements for Labuan International Commodity Trading Company

3. (1) A Labuan International Commodity Trading Company which is a Labuan entity carrying on a Labuan business activity shall in a basis period for a year of assessment fulfill the following requirements:

- (a) have at least three full-time employees; and
- (b) have an annual operating expenditure of at least three million ringgit (RM3,000,000.00).

(2) Where the Labuan International Commodity Trading Company has not more than five related companies to carry on the qualifying activity, that Labuan International Commodity Trading Company shall—

- (a) have not less than three full-time employees including at least two of them are full-time employees in its business operational office in Labuan in a group of companies; and
- (b) incur an annual operating expenditure of at least three million ringgit (RM3,000,000.00) in Malaysia including at least one hundred thousand ringgit (RM100,000.00) therefrom is incurred in Labuan for each company.

(3) Subject to subregulation (2), where the Labuan International Commodity Trading Company has more than five related companies to carry on the qualifying activity, that Labuan International Commodity Trading Company shall also have an additional full-time employee in its business operational office in Labuan for every addition of up to five related companies in a group of companies.

(4) For the purpose of these Regulations, companies are deemed to be in the same group where—

- (a) two or more companies are related companies;
- (b) a company is so related to another company which is itself so related to a third company;
- (c) the same person is holding more than fifty per cent of the shares in each of two or more companies; or
- (d) each of two or more companies is so related to at least one of two or more companies to which paragraph (c) applies.

Made 21 December 2021

[MOF(R)100-1/2/7JLD.3; MOF.TAX(S)700-2/1/154; LHDN.AYA.600-12/1(29)-175; PN(PU2)491/IV]

TENGGU DATUK SERI UTAMA ZAFRUL BIN TENGGU ABDUL AZIZ
Minister of Finance



GUIDELINES ON THE ESTABLISHMENT OF LABUAN INTERNATIONAL COMMODITY TRADING COMPANY UNDER THE GLOBAL INCENTIVES FOR TRADING PROGRAMME

1.0 Introduction

- 1.1 The Global Incentives for Trading (GIFT) programme was established to encourage companies to use Malaysia as an international trading base for specified types of commodities to be conducted on in, from or through Labuan.
- 1.2 The Guidelines sets out the parameters relating to the establishment and operations of the LITC under the GIFT programme.

2.0 Applicability

- 2.1 The Guidelines is applicable to all Labuan companies licensed as LITC under Section 86 of the *Labuan Financial Services and Securities Act 2010 (LFSSA)* to conduct international commodity trading business in Labuan IBFC.

3.0 Legal Provision

- 3.1 The Guidelines is issued pursuant to Section 4A of the *Labuan Financial Services Authority Act 1996 (LFSA)* to clarify provisions of Section 92 LFSSA pertaining to the licensing and operational requirements of LITC.

4.0 Effective Date

- 4.1 The Guidelines shall come into effect **immediately** and would remain effective and applicable unless otherwise amended or revoked.
- 4.2 Subsequently, with the issuance of the above, the following guidelines or directive have been repealed:
 - 4.2.1 Guidelines on the Establishment of LITC under the GIFT Programme issued on 8 March 2018; and

- 4.2.2 Directive on LITC trading in non-petroleum and non-petroleum related commodities dated 8 March 2018.

5.0 Global Incentives For Trading Programme

- 5.1 The GIFT programme is a framework of incentives for traders that are undertaking the trading of the following physical products and related derivatives by using Malaysia as their international trading base to undertake international commodity trading business via Labuan IBFC.
- 5.2 Any person intending to establish a Labuan entity to undertake such international commodity trading business shall apply for LITC licensee of licensees under GIFT Programme from Labuan FSA.
- 5.3 The specified trading of physical products and related derivatives are as follows:
- 5.3.1 Petroleum and petroleum-related products including liquefied natural gas;
 - 5.3.2 Minerals;
 - 5.3.3 Agriculture products;
 - 5.3.4 Refined raw materials;
 - 5.3.5 Chemicals;
 - 5.3.6 Base minerals; and
 - 5.3.7 Coal

6.0 Operational Requirements

- 6.1 In setting Malaysia as its trading base, the LITC is expected to have the following functions (but not limited to) in Malaysia:
- 6.1.1 Strategic management;
 - 6.1.2 Banking, finance and treasury management;
 - 6.1.3 Risk management;
 - 6.1.4 Market research and product portfolio development;
 - 6.1.5 Logistics management;
 - 6.1.6 Global procurement; or
 - 6.1.7 Marketing and sales planning.
- 6.2 The LITC must have sufficient capital or working funds that commensurate with its operations and activities.

- 6.3 The LITC must indicate clearly on its letterhead, stationery and other documents including signage containing its name that it is licensed as a “Labuan International Commodity Trading Company licensed by Labuan FSA”, together with its licence number.
- 6.4 The LITC is required to establish its operational office, which can be anywhere in Malaysia. The following details must be identified and provided to Labuan FSA prior to the commencement of business:
- 6.4.1 Principal Officer
Name, designation and contact details such as telephone number and e-mail address of the officer that is in charge of the LITC.
 - 6.4.2 Address of Operational Office
To provide address and organisational structure (indicating its existing and proposed staff) to be stationed at its operational office.
- 6.5 The LITC must ensure that it establishes an adequate set of internal policies and controls for its operation, proper corporate governance, risk management and compliance frameworks in place. These need to be regularly reviewed to ensure that they remain appropriate, relevant and prudent
- 6.6 Ensure that the Principal Officer, Director(s) and Officer(s) responsible for the management of the company remain fit and proper persons at all times pursuant to Section 4 of LFSSA and the Guidelines on Fit and Proper Person Requirements issued by Labuan FSA.
- 6.7 Where LITC carries on business other than the one specified under paragraph 5.1, a separate set of accounts must be maintained.
- 6.8 The LITC is required to submit to Labuan FSA the following:
- 6.8.1 The completed Annual Update Submission Form latest by 15 January of each year (as per Appendix I); and
 - 6.8.2 A copy of its audited financial statements within six (6) months after the close of each financial year.

- 6.9 Obtain prior approval from Labuan FSA on any new changes relating to the following:
- 6.9.1 Business plan;
 - 6.9.2 Principal Officer;
 - 6.9.3 Directorship; and
 - 6.9.4 Shareholding.
- 6.10 The LITC must comply with the following conditions after commencement of its business:
- 6.10.1 Achieve minimum annual turnover of USD50 million;
 - 6.10.2 Incur minimum annual business spending of RM3 million payable to Malaysian residents in Malaysian Ringgit; and
 - 6.10.3 Employ at least three professional traders that fulfill the following requirements:
 - (a) The Principal Officer or any person performing a senior management function who would be principally accountable for:
 - (i) making decisions that affect the whole, or a substantial part of the LITC business;
 - (ii) implementing and enforcing policies and strategies approved by the LITC's Board of Directors including Head of Department or any equivalent designated person; or
 - (iii) internal controls and processes of the LITC.
 - (b) These professional traders shall be involved in any one of the following areas:
 - (i) Trading;
 - (ii) Risk Management;
 - (iii) Procurement; or
 - (iv) Sales & Marketing.
 - (c) These professional traders shall be residents of Malaysia in a calendar year for the year of assessment under the Income Tax Act 1967 (ITA).
 - 6.10.4 The LITC is expected to comply with all the requirements of this Guidelines as well as the applicable laws, rules and regulations relevant to the LITC at all times. In addition, the LITC is expected to obtain the necessary approvals from the authorities in the markets it intends to operate in prior to commencing its business in those respective markets, where applicable

7.0 Annual Licence Fee

- 7.1 The annual licence fee amounting to USD13,000, is payable to Labuan FSA upon the grant of licence and may be included as part of the qualifying expenses under paragraph 6.10.2.
- 7.2 The subsequent payment of annual fee is payable not later than 15 January of every year.

8.0 Submission of Application for Licence and Enquiries

- 8.1 Any person intending to undertake Labuan international commodity trading business under the GIFT programme may apply to Labuan FSA for approval by submitting a completed *Application Form to Carry on Labuan International Commodity Trading Business* which is available in Labuan FSA's website at www.labuanibfc.com together with a processing fee of USD350.

- 8.2 The licence application under the Guidelines should be submitted to:

Head of Authorisation and Licensing
Labuan FSA
17th Floor, Main Office Tower
Financial Park Complex, Jalan Merdeka
87000 Federal Territory of Labuan, Malaysia

- 8.3 Any request for additional information or clarification pertaining to the guidelines or licensing application may be directed to the following contact details:

Telephone : +6 087 591 200
Facsimile : +6 087 453 422 / 422 300
Email : bpu@labuanfsa.gov.my (Guidelines)
licensing@labuanfsa.gov.my (Licence application)

Labuan Financial Services Authority

17 April 2020 (*updated*)
8 March 2018 (*Revised*)
6 September and 27 December 2016 (*Updated*)
1 January and 26 June 2013 (*Revisions*)
31 October 2011 (*Initial issuance*)



**LABUAN FINANCIAL SERVICES AUTHORITY
(LEMBAGA PERKHIDMATAN KEWANGAN LABUAN)**

Circular No.: 293/2023/ALL
Date: 29 November 2023

Association of Labuan Trust Companies
Association of Labuan Banks
Labuan Investment Banks Group

Dear Chairman,

Relaxation of Regulatory and Operational Requirements for Labuan International Commodity Trading Companies and Labuan Digital Banks

We refer to the Circular on the Relaxation of Regulatory and Operational Requirements for Labuan International Trading Companies, Labuan Digital Banks and Labuan Protected Cell Companies (PCC) dated 21 November 2022.

2. Labuan FSA recognises the importance of creating an enabling environment for digital banks and international commodity trading in Labuan International Business and Financial Centre. In this regard, Labuan FSA is pleased to provide an extension of time until 31 December 2026 for the relaxation of regulatory and operational requirements for Labuan International Commodity Trading Companies (LITC) and Labuan digital banks, hereinafter referred to as “Regulatory Relaxation” to allow these entities to continue operating under a temporary regulatory relief framework.

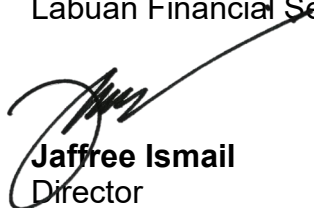
3. The Regulatory Relaxation will enable Labuan digital banks to further develop their business models, enhance customer experience, and contribute to the overall financial ecosystem. Similarly, the LITC will be able to adapt to changing market dynamics, explore new opportunities, and contribute to the development of Labuan as a prominent commodity trading hub.

4. Details of the Regulatory Relaxation is attached under **Appendix 1**. In the interim, Labuan FSA will continue its efforts on the review of current regulatory and operational requirements for the relevant business Guidelines in line with the enabling initiatives under the Labuan IBFC Strategic Roadmap 2022 – 2026.

5. For the Chairman of Labuan associations, we seek your assistance in disseminating the above information to the members of your respective Association. The same will be uploaded on Labuan FSA's website at www.labuanfsa.gov.my. Should you require any clarification on the above matters please do not hesitate to contact us at bpu@labuanfsa.gov.my.

Thank you.

For and on behalf of
Labuan Financial Services Authority

A handwritten signature in black ink, appearing to read 'Jaffree Ismail', is written over the printed name and title.

Jaffree Ismail
Director
Business Development and Innovation Department

**Relaxation of Regulatory and Operation Requirements
Labuan International Commodity Trading Companies and Labuan Digital Banks**

No.	Current Regulatory and Operation Requirements	Applicability	Relaxation of Regulatory and Operation Requirements	Duration
1.	<u>Guidelines on the Establishment of Labuan International Commodity Trading Company under the Global Incentives for Trading Programme (Para 6.10)</u> Achieve minimum annual turnover of USD50 million.	Labuan International Commodity Trading Companies (LITCs)	The minimum annual turnover for LITCs is reduced as follows: a) For petroleum and petroleum-related products including liquefied natural gas: ⇒ USD25 million. b) For other than petroleum and petroleum-related products including liquefied natural gas: ⇒ USD10 million.	From the date of this Circular until 31 December 2026
2.	<u>Labuan Digital Banking Framework (Para 5.1)</u> Maintain minimum capital that is unimpaired by losses of at least RM200 million or its equivalent in any foreign currency.	Labuan Digital Bank	The minimum capital requirement is reduced to RM50 million or its equivalent in any foreign currency unimpaired by losses.	From the date of this Circular until 31 December 2026

3.	<u>Labuan Digital Banking Framework (Para 5.2)</u> Place a non-interest bearing security deposit with Labuan FSA amounting to RM5 million or its equivalent in any foreign currency which is refundable after three years from the date of placement, subject to the assessment of the digital bank's performance over three years.	Labuan Digital Bank	The non-interest bearing security deposit is reduced to RM2.5 million.	From the date of this Circular until 31 December 2026
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