



INLAND REVENUE BOARD MALAYSIA

**TAXATION OF
MALAYSIAN EMPLOYEES
SECONDED OVERSEAS**

PUBLIC RULING NO. 1/2011

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DIRECTOR GENERAL'S PUBLIC RULING

A Public Ruling as provided for under section 138A of the Income Tax Act 1967 is issued for the purpose of providing guidance for the public and officers of the Inland Revenue Board Malaysia. It sets out the interpretation of the Director General of Inland Revenue in respect of the particular tax law, and the policy and procedure that are to be applied.

A Public Ruling may be withdrawn, either wholly or in part, by notice of withdrawal or by publication of a new ruling which is inconsistent with it.

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

1. This Ruling explains the tax treatment of employment income derived by employees from Malaysia who are seconded by their employer to perform duties outside Malaysia.
2. The provisions of the Income Tax Act 1967 (ITA) related to this Ruling are sections 2, 7, 13, 25, 83, 132, 133 and Schedule 7.
3. The words used in this Ruling have the following meaning:
 - 3.1 “Foreign tax” means any tax on income (or any other tax of a substantially similar character) chargeable or imposed by or under the laws of a territory outside Malaysia.
 - 3.2 “Malaysian tax” means tax imposed by the ITA.
 - 3.3 “Seconded” means –
 - a) an employee is transferred temporarily by the employer to perform duties elsewhere; and
 - b) after the completion of his temporary duties the employee returns to the same employer to continue his employment.
 - 3.4 “Bilateral credit” means credit in respect of foreign tax which, by virtue of any arrangements having effect under section 132 of the ITA, is to be allowed as a credit against Malaysian tax.
 - 3.5 “Unilateral credit” means credit in respect of foreign tax payable under the laws of a territory outside Malaysia with respect to which no arrangements under section 132 of the ITA are in force.
 - 3.6 “Employer” in relation to an employment, means –
 - a) where the relationship of master and servant subsists, the master;
 - b) where the relationship does not subsist, the person who pays or is responsible for paying any remuneration to the employee who has the employment, notwithstanding that that person and the employee may be the same person acting in different capacities.
 - 3.7 “Employee” in relation to an employment, means –
 - a) where the relationship of master and servant subsists, the servant;
 - b) where the relationship does not subsist, the holder of the appointment or office which constitutes the employment.

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- 3.8 “Resident of Malaysia” means resident in Malaysia for the basis year for a year of assessment by virtue of section 7 of the ITA.
- 3.9 “Foreign income” means income derived from outside Malaysia or in the case of bilateral credit, includes income derived from Malaysia charged to foreign tax.
- 3.10 “Statutory Income”, in relation to a person, a source and a year of assessment, means statutory income ascertained in accordance with the ITA.
- 3.11 “Employment” means –
- a) employment in which the relationship of master and servant subsists;
 - b) any appointment or office, whether public or not and whether or not that relationship subsists, for which remuneration is payable.
- 3.12 “Assessment” means any assessment or additional assessment made under the ITA.
- 3.13 “Basis year” in relation to a year of assessment for an employment source is the basis period for that year of assessment.
- 3.14 “Year of assessment” means calendar year.
- 3.15 “Basis period” in relation to gross income from employment is ascertained by section 25 of the ITA.

4. **The application of this Ruling**

This Ruling is applicable to employees in Malaysia who are seconded overseas except for Malaysian citizens employed in the public services or a statutory authority in Malaysia but exercise their employment overseas.

5. **Basis of assessment of employment income**

The employment income for the basis year for a year of assessment is assessed as income for that year of assessment when the income is received. As an example, employment income for the period 1.1.2010 to 31.12.2010 is assessed as income for the year of assessment 2010.

6. **Employment income**

Subsection 13(1) of the ITA explains the types of income that is included as gross income from employment. Under subsection 13(2) of the ITA, income from an employment is deemed derived from Malaysia if the income arises for any period:

- a) during which the employment is exercised in Malaysia;
- b) leave is attributable to the exercise of the employment in Malaysia;
- c) during which the employee performs outside Malaysia duties incidental to the exercise of the employment in Malaysia;
- d) during which a person is a director of a company resident in Malaysia; or
- e) during which the employment is exercised aboard a ship or aircraft used in a business of a person resident in Malaysia.

7. **Incidental duties**

The word “incidental” has not been defined in the ITA. Therefore, the meaning of the word incidental has to be referred to case laws. In the case of *GBH v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MSTC 579, the Special Commissioners referred to Black’s Law Dictionary 5th Edition (1979) for the meaning of the expression ‘incidental to employment’ i.e:

“A risk is ‘incidental to employment’ within the Workers Compensation Act, when it belongs to or is connected with what a worker has to do in fulfilling the duties of his or her employment.”

In the case of *Robson v Dixon* 48 TC 527, the court has observed that -

“the words ‘merely incidental to’ are upon the ordinary use apt to denote an activity (here the performance of duties) which does not serve any independent purpose but is carried out in order to further some other purpose.”

Based on these case laws, incidental duties may be considered as duties that are connected to the duties of the main employment and which constitutes a necessary part of an employment. Incidental duties are exercised not to serve any independent purpose but to fulfill the purpose of the main employment.

8. **Determination of incidental duties**

Some of the factors and circumstances to be considered collectively in determining whether the duties of employees on overseas secondment are incidental to the exercise of the employment in Malaysia.

Factors and Circumstances	Details
<p>1) Exercise of the employment in Malaysia</p>	<p>Ascertain whether:</p> <ul style="list-style-type: none"> i) an employer-employee relationship exists; and ii) the employee exercised his employment (performed services) with the employer in Malaysia prior to being seconded overseas. <p>Example 1</p> <p>An engineering company in Malaysia employs a civil engineer and immediately seconds him to Dubai to work on a project which the company is handling in Dubai. The civil engineer did not exercise his employment with the company in Malaysia prior to his overseas secondment.</p> <p><i>Although an employer-employee relationship exists between the company and the civil engineer but since the employee did not exercise his employment in Malaysia prior his secondment overseas, the civil engineer's overseas duties are not incidental to the employment in Malaysia.</i></p> <p>Example 2</p> <p>A parent company in Malaysia with subsidiaries in both Malaysia and overseas employs an accountant cum financial controller. The employee is then seconded to work at one of the subsidiaries in Malaysia. After a few years, the subsidiary company in Malaysia seconds the employee to work at another subsidiary in Indonesia for 3 months to carry out some related duties.</p> <p><i>Although the contract of employment is with the parent company where an employer-employee relationship</i></p>

	<p><i>exists, the subsidiary company in Malaysia where the employee was first seconded is the deemed employer by virtue of subsection 83(6) of the ITA. As such, the secondment to Indonesia is considered incidental to the employment in Malaysia.</i></p>
<p>2) Nature of overseas duties</p>	<p>If the duties performed outside Malaysia are connected with or are part and parcel of the employee's regular duties in Malaysia, then the overseas duties are considered incidental to the employment exercised in Malaysia.</p> <p>Example 3</p> <p>A senior marketing manager in Malaysia has been employed to carry out the main duty of providing service to the dealers in both Malaysia and the South East Asian region.</p> <p><i>As the duties performed overseas by the senior marketing manager is connected to the duties in Malaysia and is part and parcel of his regular duties, the overseas duties are considered incidental duties.</i></p>
<p>3) Purpose of overseas duties</p>	<p>The duties in Malaysia and outside Malaysia can be the same or not but if both the duties are carried out within the same employer-employee relationship and to further the purpose of the employer in Malaysia, then the overseas duties are considered incidental to the exercise of the employment in Malaysia.</p> <p>Example 4</p> <p>A construction company in Malaysia, involved with various overseas projects sends an employee overseas to work as a project supervisor. The employees' duties overseas and in Malaysia differ. The company is responsible for the decision making of the overseas project, bears the risks and enjoys the benefits from the duties exercised overseas.</p> <p><i>As the company is involved in the construction business in and outside Malaysia, the overseas duties performed by the employee are to further the purpose of the employer in Malaysia. As such, the overseas duties are considered incidental to the exercise of the employment in Malaysia.</i></p>

<p>4) Temporary nature of overseas duties</p>	<p>If after the completion of the overseas duties, the employee resumes work with his employer in Malaysia, these overseas duties would be considered temporary in nature and incidental to the main employment. The amount of time spent or the quantum of duties performed overseas is not a decisive factor in determining that the overseas duties are incidental to the employment exercised in Malaysia.</p> <p>Although the employee does not return to work for the employer in Malaysia due to some specific reasons, the overseas duties are still considered temporary.</p> <p>Example 5</p> <p>An employee of an engineering company in Malaysia has been sent overseas to work for a year. After the completion of the overseas tasks, the employee returns to Malaysia to resume his regular work.</p> <p><i>As the employee returns to his employer in Malaysia to continue his regular work, the overseas duties are considered temporary in nature and considered incidental to the exercise of the employment in Malaysia.</i></p> <p>Example 6</p> <p>An employee of an engineering company in Malaysia has been sent overseas to work for 2 years. The employee is required to resume work with his employer in Malaysia after the completion of the overseas tasks. However, the employee does not do so as a new job offer by another company overseas was accepted.</p> <p><i>Although the employee does not return to his employer in Malaysia to continue his regular work, the overseas duties for a period of 2 years are temporary in nature and considered incidental to the exercise of the employment in Malaysia.</i></p>
<p>5) Place from where the duties are directed and controlled</p>	<p>As long as the direction and control lies with the employer in Malaysia, the overseas duties will be considered incidental to the employment in Malaysia although the directions are given infrequently or the</p>

	<p>control is through directions from the employer in Malaysia to the employee outside Malaysia. Control means setting standards, measuring actual performance and taking corrective action based on the reports received.</p> <p>Example 7</p> <p>A construction company in Malaysia sends an employee to supervise a company project overseas. The company in Malaysia makes all the decisions and issues all the directions related to the employees overseas duties. All the progress reports of the overseas project are also sent to the company in Malaysia.</p> <p><i>As the direction and control of the overseas duties still lie with the company in Malaysia, the overseas duties are considered incidental to the exercise of the employment in Malaysia.</i></p>
6) Payment for services performed	<p>If a company in Malaysia that enjoys the benefits from the overseas duties bears the cost of the employee's remuneration during the overseas secondment, the overseas duties are considered incidental to the exercise of employment in Malaysia.</p>
7) Commercial reality	<p>If an employer in Malaysia bears the risk and directly enjoys the economic benefits from the performance of the employee's overseas duties then the duties performed overseas would be considered incidental to the exercise of his employment in Malaysia. The risk borne and the benefits received which are related to the work done in Malaysia and overseas has to be viewed from the perspective of commercial rationale.</p>

9. Case studies of overseas duties that are considered incidental to the exercise of employment in Malaysia

Case Study 1

Facts of the case: Hilmi was seconded to Indonesia and Brunei

Description of employment	Details
Designation & Nature of job	Mechanical engineer with an Oil & Gas company in Malaysia since 1.6.2000. Oversees the implementation required for the maintenance program of projects in Malaysia and outside Malaysia. The responsibilities include troubleshooting and failure analysis, rotating equipment to achieve availability and reliability of plant equipment and associated facilities.
Duration working in Malaysia in 2008	10 months.
Duration working overseas in 2008	1 month in Indonesia and 1 month in Brunei. The secondment overseas was temporary in nature as Hilmi continued his employment with the same employer in Malaysia after the completion of the overseas duties.
Duties overseas	Oversees the projects of the employer in Indonesia and Brunei.
Direction and control	The employer in Malaysia made all the decisions and issued all the instructions relating to Hilmi's overseas duties. All progress reports regarding the inspection of projects overseas were sent to the employer in Malaysia. The employer in Malaysia bore all the risks and received the benefits from the work that was carried out overseas by Hilmi.
Remuneration	Hilmi's remuneration for the duration of the overseas secondment was borne by the employer in Malaysia.

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

Factors and circumstances to consider	Yes / No
<i>Did the employee exercise his employment in Malaysia prior to being sent overseas to work?</i>	Yes

<p><i>Were the duties performed overseas connected to or part and parcel of the regular employment duties performed in Malaysia?</i></p> <p><i>Hilmi oversaw the implementation required for the maintenance program of projects in Malaysia and outside Malaysia. Therefore his duties in both Indonesia and Brunei were connected to and also part and parcel of his regular duties in Malaysia.</i></p>	Yes
<p><i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i></p> <p><i>The duties performed overseas by the employee were to further the purpose of the employer in Malaysia, which had projects both in and outside Malaysia.</i></p>	Yes
<p><i>Were the overseas duties temporary?</i></p> <p><i>The overseas duties were temporary in nature as Hilmi continued his work with the same employer on his return to Malaysia after the completion of his overseas duties.</i></p>	Yes
<p><i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i></p>	Yes
<p><i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i></p>	Yes
<p><i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i></p>	Yes

Hilmi's overseas duties for the 2 months are considered incidental to the exercise of his employment in Malaysia.

Case Study 2

Facts of the case: Balan was seconded to India

Description of employment	Details
Designation & Nature of job	Process Technology/Operations engineer with an engineering company in Malaysia since 1999. Oversees the

	implementation of process/utility related activities aimed at maximizing plant capacity, efficiency and safety of projects carried out by the company. Performs feasibility studies and process engineering design for plant improvement to ensure a flexible and economical operation.
Duration working in Malaysia in 2008	214 days.
Duration of overseas duties in 2008	In India from 1.1.2008 to 31.5.2008 (152 days). The secondment overseas was temporary in nature as Balan continued his employment with the same employer on his return to Malaysia after the completion of the overseas duties.
Duties overseas	Perform a feasibility study of a project in India for the employer in Malaysia, which planned to submit a tender for the project through a joint venture partnership in India.
Direction and control	All decision making and instructions were issued by the employer in Malaysia. All feasibility studies and process engineering design reports were sent to the employer in Malaysia. The Malaysian employer bore the risks and received the benefits from the work that was carried out by the employee seconded overseas.
Remuneration	The remuneration of the employee for the duration of the overseas secondment was borne by the employer in Malaysia.

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

Factors and circumstances to consider	Yes/No
<i>Did the employee exercise his employment in Malaysia prior to being sent overseas to work?</i>	Yes
<i>Were the duties performed overseas connected to or part and parcel of the regular employment duties performed in Malaysia?</i>	Yes

<i>The performance of feasibility studies in India was connected to and also part and parcel of the regular duties in Malaysia.</i>	
<i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i> <i>The decisions of the work done overseas lies with the employer in Malaysia. As such, the overseas duties are to further the purpose of the company in Malaysia.</i>	Yes
<i>Were the overseas duties temporary?</i> <i>The overseas duties were temporary in nature as Balan continued with his duties with the same employer on his return to Malaysia after the completion of his overseas duties.</i>	Yes
<i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i>	Yes
<i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i>	Yes
<i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i>	Yes

Balan's duties performed overseas for the duration of 152 days are considered incidental to the exercise of his employment in Malaysia.

10. **Case studies of overseas duties that are not considered incidental to the exercise of employment in Malaysia**

Case Study 3

Facts of the case: Peng was seconded to China

Description of employment	Details
Designation & Nature of job	Civil/Structural engineer of an engineering company in Malaysia since 2003. Plans, evaluate, co-ordinate, recommend and implement maintenance, consultancy, research or construction projects and services and

	engineering designs to serve the needs of the company according to specifications and standards set.
Duration working in Malaysia in 2007	Nil.
Duration of overseas duties	In China from 1.1.2007 to 31.12.2008 (2 years). The secondment overseas was temporary in nature as Peng continued his employment with the same employer on his return to Malaysia after the completion of the overseas duties.
Duties Overseas	Similar to the duties in Malaysia.
Direction and control	Subsidiary company in China was responsible for the decision making and issued all the instructions for work carried out in China. All plans and evaluation reports were sent to the company in China. The risk related to the work that was carried out by the employee was borne by the company in China and the benefits were also enjoyed by the company in China based on the decision making of the company in China.
Remuneration	The employer in Malaysia credited the employee's bank account with the monthly remuneration but did not bear the remuneration of the employee for the duration of the overseas secondment. The remuneration was recharged to the company in China.

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

Factors and circumstances to consider	Yes/No
<i>Did the employee exercise his employment in Malaysia prior to being sent overseas to work?</i>	Yes
<i>Were the duties performed overseas connected to or part and parcel of the regular employment duties performed in Malaysia?</i>	No
<i>The duties performed as a civil/structural engineer in both</i>	

<i>Malaysia and overseas are similar. The work done in China is related to a project that is not connected to the employer in Malaysia as the subsidiary company in China bears all the risks and receives the benefits from the work done in China.</i>	
<i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i> <i>The duties performed overseas was independent of the duties in Malaysia as the subsidiary company in China was responsible for all the decision-making of the job done in China.</i>	No
<i>Were the overseas duties temporary?</i> <i>The overseas duties were temporary since Peng continued to work with the same employer on his return to Malaysia after the completion of his secondment to China.</i>	Yes
<i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i>	No
<i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i>	No
<i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i>	Yes

Peng's duties in China are not incidental to his employment in Malaysia. The remuneration received for the period from 1.1.2007 to 31.12.2008 are not deemed derived from Malaysia and is not taxable in Malaysia.

Case Study 4

Facts of the case: Petroleum engineers seconded overseas

Description of employment	Details
Designation & Nature of job	Petroleum engineers of an Oil & Gas company in Malaysia since 1990. Carry out data analysis and interpretation of technical studies for formulation and implementation of petroleum engineering projects.

Duration working in Malaysia in 2007	15 days.
Duration of overseas duties	Overseas for a period of 1 to 3 years with effect from 2007.
Duties overseas	Similar to the duties in Malaysia.
Direction and control	<p>Company overseas was responsible for the decision making and issued all the instructions.</p> <p>The company overseas bore the risks and received the benefits from the work that was carried out by the employees seconded overseas based on the decisions of the overseas company.</p>
Remuneration	The employer in Malaysia credited the employee's bank account with the monthly remuneration but did not bear the remuneration of the employee for the duration of the overseas secondment. The remuneration was recharged to the companies overseas.

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

Factors and circumstances to consider	Yes/ No
<i>Did the employee exercise his employment in Malaysia prior to being sent overseas to work?</i>	Yes
<p><i>Were the duties performed overseas connected to, a regular part or part and parcel of the regular employment duties performed in Malaysia?</i></p> <p><i>Although the duties performed as a petroleum engineer in both Malaysia and overseas were similar, the work done overseas was determined by the overseas company which bore all the risks and enjoyed the benefits from the completed job. The overseas duties were not connected to and not part and parcel of the duties in Malaysia.</i></p>	No

<p><i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i></p> <p><i>The duties performed overseas were for an independent purpose as all the instructions were issued by and all reports were made to the overseas companies.</i></p>	No
<p><i>Were the overseas duties temporary?</i></p> <p><i>The secondment overseas was considered temporary as the employees continued to work with the same company on their return to Malaysia after the completion of their secondment overseas.</i></p>	Yes
<p><i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i></p>	No
<p><i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i></p>	No
<p><i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i></p>	Yes

The duties performed overseas by the employees are not incidental to the employment in Malaysia.

11. Observation of Case Study 1 to 4

In Case Study 1 and 2, it can be noted that the overseas duties are considered incidental to the employment in Malaysia because:

- i. the employees had exercised their employment in Malaysia prior to being sent overseas; and
- ii. the duties performed overseas are connected to the duties in Malaysia and are part and parcel of their job responsibilities; and
- iii. the overseas duties are not for an independent purpose but to further the purpose of the employer in Malaysia, which is responsible for the decision making of the work done overseas. Furthermore, the employer in Malaysia bears all the risks and receives the benefits from the work that was carried out (based on its decision making) by the employee overseas.

On the other hand, in Case Study 3 and 4, the overseas duties are not considered incidental to the employment in Malaysia because:

- i. the duties performed overseas are not connected to or part and parcel of the regular duties performed in Malaysia; and
- ii. the overseas duties are for an independent purpose and not to further the purpose of the employer in Malaysia since the decision making of the work done overseas lies with the company overseas. The employer in Malaysia did not bear any of the risks or receive the benefits from the job done overseas.

12. Tax treatment of employees from Malaysia who are seconded overseas

12.1 Double taxation

An employee who is seconded overseas to work may be subjected to double taxation when he is taxed in both Malaysia and the host country overseas. Double taxation occurs when two countries impose income tax with respect to the same item of income on the same taxable person.

12.2 Agreements for the Avoidance of Double Taxation (DTA)

To mitigate the effects of double taxation on its residents deriving income from outside its own national boundary, many countries including Malaysia have entered into Agreements for the DTA with countries overseas. These countries that have entered into such agreements with Malaysia are known as treaty countries whereas countries that have not entered into such agreements with Malaysia are non-treaty countries.

12.3 Malaysian DTAs

The text of the Malaysian DTAs with countries overseas are available at the Inland Revenue Board Malaysia (IRBM) website at www.hasil.gov.my.

12.4 Bilateral credit relief

When the employment income is taxed in Malaysia and in the host country that has a tax treaty with Malaysia, the Malaysian tax laws provides for a relief in the form of a bilateral credit under section 132 of the ITA. The computation of this credit is as follows:

<p>Malaysian tax payable before bilateral credit/unilateral credit</p>	X	<p>¹Foreign income charged <u>to tax twice (statutory income)</u> Total income</p>
Or		
<p>Foreign tax charged in respect of the foreign income charged to tax twice, whichever is the lower</p> <p>(¹With effect from the year of assessment 2007, foreign income for the purposes of claiming bilateral credit includes income derived from Malaysia and charged to foreign tax)</p>		

12.5 DTA - Dependent Personal Services Article

12.5.1 Basis for taxing employment income

The Dependent Personal Services Article in the DTA sets out the basis for taxing remuneration derived by an individual resident in one country from the exercise of employment (including professional services) in the other country.

12.5.2 Exemption of tax in host country overseas

An individual who exercises his employment in a treaty country may be granted a tax exemption by that country overseas if the all of the following conditions are satisfied (wordings may vary according to each DTA):

- a) The employee is present in the host country overseas (country of source) for not more than 183 days in any 12-month period commencing or ending in the fiscal year concerned / calendar year; and
- b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the host country overseas; and
- c) The remuneration is not borne by a permanent establishment, or a fixed base which the employer has in the host country overseas. In other words, the remuneration is not charged as a deductible expense in the Profit and Loss account of the permanent establishment, which the employer has in the host country overseas.

For this purpose, the term *remuneration* and *borne by* in the Dependant Personal Services Article in the relevant DTAs has the following meaning:

- (i) *remuneration* means salaries, wages and other similar remuneration which includes benefits in kind received in respect of an employment; and
- (ii) *borne by* means that the remuneration is allowable as a deduction for tax purposes and not merely as a deduction from the profits of the permanent establishment.

If all of the above conditions are satisfied, then the employee will be exempted from tax in the host country overseas. The country of residence will have the full taxing rights and the issue of double taxation does not arise.

On the other hand, if any of the above conditions are not satisfied, the employee may be taxed in the host country overseas. When the same income is taxed in the country of residence and in the host country overseas, bilateral credit

relief can be claimed from the country of residence which will reduce the tax by the amount of tax paid to the host country overseas. However, this is subject to the domestic tax laws of the countries concerned.

Case Study 5

Facts are the same as in Case Study 1.

Hilmi's tax liability is determined as follows:

- a) *Hilmi's overseas duties are considered incidental to the exercise of his employment in Malaysia and the employment income is deemed derived from Malaysia as explained in Case Study 1. The employment income is therefore taxable in Malaysia.*
- b) *Although there is a tax treaty between Malaysia and Indonesia, this does not preclude Malaysia from taxing Hilmi's employment income for the duration of his services performed in Indonesia.*
- c) *If Hilmi is also taxed on the same income in Indonesia, he may make a claim for a bilateral credit relief in the country of residence (Malaysia).*

- d) *As Malaysia has a DTA with Indonesia, Hilmi will be exempted from tax in Indonesia if he satisfies all of the following 3 conditions under the Dependent Personal Services Article [Article 14(2)]:*

Article	Conditions to qualify for a tax exemption in Indonesia	Conditions satisfied or not	Reasons for decision
14(2)(a)	<i>Hilmi is present in Indonesia for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned (2008).</i>	Yes	<i>Hilmi was present in Indonesia for 1 month i.e. less than 183 days in 2008.</i>
14(2)(b)	<i>The services or activities are exercised or performed for or on behalf of a person who is a resident of Malaysia.</i>	Yes	<i>Hilmi performed the services for and on behalf of the employer who is a resident in Malaysia.</i>
14(2)(c)	<i>The remuneration or income is not borne by a permanent establishment which the person paying the remuneration has in Indonesia.</i>	Yes	<i>The remuneration was borne by the employer in Malaysia that does not have a permanent establishment in India.</i>

Hilmi has satisfied all the 3 conditions to qualify for a tax exemption in Indonesia.

- e) *The duties performed in Brunei are also considered incidental to the employment exercised in Malaysia and the income for the relevant period is deemed derived from Malaysia (as explained in Case Study 1). Since there was no DTA between Malaysia and Brunei in 2008, Malaysia's domestic tax laws prevail.*

However, it is to be noted that a DTA between Malaysia and Brunei is effective from 1.1.2011. If Hilmi is seconded to Brunei in 2011 instead of 2008, he will still be subject to tax in Malaysia in the year

of assessment 2011 as the duties performed in Brunei are incidental to the duties exercised in Malaysia. His tax liability in Brunei will depend on:

- (i) whether all the conditions of the Dependent Personal Services Article [Article 15(2)] of the DTA between Malaysia and Brunei are satisfied or not; and
 - (ii) the domestic tax laws of Brunei.
- f) For the year of assessment 2008, Hilmi is taxable in Malaysia on the employment income derived from the exercise of his employment in Malaysia, Indonesia and Brunei.

Case Study 6

Facts are the same as in Case Study 2.

Balan's tax liability is determined as follows:

- a) Balan's overseas duties are incidental to the exercise of his employment in Malaysia and the employment income is deemed derived from Malaysia as explained in Case Study 2. The employment income is therefore taxable in Malaysia.
- b) Although there is a tax treaty between Malaysia and India, this does not preclude Malaysia from taxing Balan's employment income for the duration he performed his services in India.
- c) If Balan is also taxed on the same income in India, he may make a claim for a bilateral credit relief in the country of residence (Malaysia).
- d) As Malaysia has a tax treaty with India, Balan will be exempted from tax in India if he satisfies all of the following 3 conditions under the Dependent Personal Services Article [Article 15(2)] :

Article	Conditions to qualify for a tax exemption in India	Conditions are satisfied or not	Reasons for decision
15(2)(a)	Balan is present in India for a period or periods not exceeding in the aggregate 183 days in any 12 month	Yes	Balan was present in India for less than 183 days.

	<i>period commencing or ending in the fiscal year concerned.</i>		
15(2)(b)	<i>The remuneration is paid by, or on behalf of, an employer who is not a resident of India.</i>	Yes	<i>The remuneration was paid by the employer in Malaysia who is not a resident in India.</i>
15(2)(c)	<i>The remuneration is not borne by a resident or permanent establishment or fixed base which the employer has in India or by a person carrying on independent personal services in India.</i>	Yes	<i>The remuneration was borne by the employer in Malaysia that does not have a permanent establishment in India.</i>

Balan has satisfied all the 3 conditions to qualify for a tax exemption in India.

- e) *For the year of assessment 2008, Balan will be taxed in Malaysia on the income derived for the period he exercised his employment in Malaysia and India.*

Case Study 7

Facts of the case: Zali was seconded to Pakistan

Description of employment	Details
Designation & Nature of job	System design expert for a US multinational company based in Malaysia since 1998. The resident company designs software worldwide through a number of its branches.
Duration working in Malaysia in 2008	352 days.

Duration of overseas duties in 2008	14 days in Pakistan.
Duties overseas	Trained the staff at the IT Unit at the branch office in Pakistan.
Direction and control	All decision making and instructions were issued by employer in Malaysia.
Remuneration	<p>Monthly remuneration was paid and borne by the employer in Malaysia.</p> <p>Salary RM10,000 X 12 months = RM120,000 Bonus RM10,000 X 2 months = RM20,000</p> <p>Allowance for 14 days was paid by the branch in Pakistan to cover accommodation, meals and transport.</p> <p>Allowance (14 days) = RM10,000</p>
Tax liability in Pakistan	<p>Assuming that RM2,000 was paid. (Currency conversion based on the foreign exchange rates can be obtained from the IRBM's website at www.hasil.gov.my)</p>

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

Factors and circumstances to consider	Yes/No
<i>Did the employee exercise his employment in Malaysia prior to being sent overseas to work?</i>	Yes
<p><i>Were the duties performed overseas connected to or part and parcel of the employment duties performed in Malaysia?</i></p> <p><i>Since Zali is a systems design expert who designs software, his job responsibilities would include training IT personnel to operate the system. As such, the duties he performed in Malaysia and overseas were connected or part and parcel of his duties with the company in Malaysia.</i></p>	Yes

<i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i>	Yes
<i>Were the overseas duties temporary?</i>	Yes
<i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i>	Yes
<i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i>	Yes
<i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i>	Yes

- a) *Zali's duties in Pakistan are considered incidental to the exercise of his employment in Malaysia and his employment income is deemed derived from Malaysia.*
- b) *Although there is a tax treaty between Malaysia and Pakistan, this does not preclude Malaysia from taxing Zali's employment income for the duration he performed his services in Pakistan.*
- c) *If Zali is also taxed on the same income in Pakistan, he may make a claim for a bilateral credit relief in the country of residence (Malaysia).*
- d) *As Malaysia has a tax treaty with Pakistan, Zali will be exempted from tax in Pakistan if he satisfies all of the following 3 conditions under the Dependent Personal Services Article [Article 15(2)]:*

Article	Conditions qualify for a tax exemption in Pakistan	Conditions satisfied or not	Reasons for decision
15(2)(a)	<i>Zali is present in Pakistan for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned.</i>	Yes	<i>Zali is present in Pakistan for less than 183 days.</i>

15(2)(b)	<i>The services or activities are exercised or performed for or on behalf of an employer who is not a resident of Pakistan.</i>	Yes	<i>The duties performed in Pakistan are for and on behalf of his employer who is a resident in Malaysia.</i>
15(2)(c)	<i>The remuneration is not directly deductible from the income of a permanent establishment which the employer has in Pakistan.</i>	No	<i>The monthly remuneration paid by the employer in Malaysia is deductible from the income of the employer. The allowance paid by the branch in Pakistan is deductible from the income of the branch which has a permanent establishment in Pakistan.</i> <i>Note: For the purpose of this example, it is assumed that the branch in Pakistan has a permanent establishment.</i>

Zali is not exempted from tax in Pakistan as he did not satisfy all the 3 conditions.

- e) *For the year of assessment 2008, Zali will be taxed in Malaysia on the employment income derived from the exercise of his employment in Malaysia and Pakistan. The allowance paid by the branch in Pakistan is deemed derived from Malaysia since his duties in Pakistan is incidental to the employment in Malaysia and therefore it is taxable in Malaysia.*
- f) *Zali does not qualify for a tax exemption in Pakistan pursuant to Article 15 of the DTA between Malaysia and Pakistan as he received allowances from a company with a permanent establishment in*

Pakistan. Zali's tax liability in Pakistan will depend on the domestic tax laws in Pakistan. However, for the purpose of this example, it has been assumed that Zali has been taxed in Pakistan. As such, he may make a claim for a bilateral credit relief from the country of residence (Malaysia). The tax computation is as follows:

Computation of tax payable in Malaysia

	<i>RM</i>
<i>Employment income from Malaysia (Statutory Income)</i>	<i>140,000</i>
<i>Employment income from Pakistan (Statutory Income)</i>	<u><i>10,000</i></u>
<i>Total income</i>	<i>150,000</i>
	<i>RM</i>
<i>Less: Personal Relief</i>	<i>8,000</i>
<i>Children</i>	<i>4,000</i>
<i>EPF/Life insurance</i>	<i>6,000</i>
<i>Medical insurance</i>	<i>3,000</i>
<i>Medical for parents</i>	<i>5,000</i>
<i>Personal computer</i>	<i>3,000</i>
<i>Books</i>	<u><i>1,000</i></u>
	<u><i>30,000</i></u>
<i>Chargeable income</i>	<u><i>120,000</i></u>

Income tax payable

	<i>RM</i>
<i>First RM100,000</i>	<i>14,475.00</i>
<i>Next RM20,000 @ 27%</i>	<u><i>5,400.00</i></u>
	<i>19,875.00</i>

Less:

Bilateral credit under section 132 of the ITA

$$\frac{RM10,000}{RM150,000} \times RM19,875 = RM1,325.00$$

Or

*Foreign tax paid (on allowance) = RM2,000,
whichever is the lower* *1,325.00*

*Tax payable in Malaysia after allowing the bilateral
credit under section 132 of the ITA* *18,550.00*

Case Study 8

Facts of the case: Wang was seconded to South Korea

Description of employment	Details
Designation & Nature of job	Engineer of a telecommunications company in Malaysia since 2003. Mobile Network GPRS SGSN & GGSN, Configuration, Nokia, Ericsson PS Core Engineer. Working with the Core projects team, required to take a detailed design plan and implement the solution. Must be able to configure Ericsson SGSN and GGSN GPRS solutions.
Duration working in Malaysia in 2007	Nil.
Duration of overseas duties	2 years from 1.1.2007 to 31.12.2008.
Duties overseas	The South Korean company and the company in Malaysia have entered into an agreement whereby the Malaysian company will provide services in the form of expertise. Wang's duties in South Korea and Malaysia are similar.
Direction and control	Company in South Korea makes all the decisions and issues all the instructions.
Remuneration	Monthly remuneration was paid by the employer in Malaysia. The company in South Korea paid a lump sum fee to the company in Malaysia, which includes the remuneration of employees.

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

<i>Factors and circumstances to consider</i>	Yes/No
<i>Did the employee exercise his employment in Malaysia prior to being sent overseas to work?</i>	Yes
<p><i>Were the duties performed overseas connected to or part and parcel of the employment duties performed in Malaysia?</i></p> <p><i>The duties performed as an engineer in both Malaysia and overseas were similar. The work done in South Korea was related to a project that was not connected to the employer in Malaysia as the company in South Korea bore all the risks and received the benefits from the work done in South Korea.</i></p>	No
<p><i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i></p> <p><i>The duties performed overseas were independent of the duties in Malaysia as the company in South Korea was responsible for all the decision-making of the job done in South Korea.</i></p>	No
<p><i>Were the overseas duties temporary?</i></p> <p><i>The overseas duties were temporary since Wang continued to work with the same employer on his return to Malaysia after the completion of his secondment to South Korea.</i></p>	Yes
<i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i>	No
<i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i>	No
<i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i>	Yes

Wang will not be taxable in Malaysia as his overseas duties are not incidental to the employment in Malaysia. Wang's tax liability in South Korea will depend on the domestic tax laws of South Korea.

Observation

In Case Study 5, 6 and 7 the overseas duties are considered incidental to the exercise of employment in Malaysia. Although the overseas duties are performed in treaty countries, Malaysia is not precluded from taxing the employment income which is deemed derived from Malaysia. Should the same income be taxed in both countries and if Malaysia is the country of residence, a relief in the form of bilateral credit will be allowed, if claimed.

However, in Case Study 8 the overseas duties in the treaty country is not considered incidental to the exercise of the employment in Malaysia. As such, the employment income attributable to the overseas employment is not taxable in Malaysia.

12.6 Unilateral credit relief

A relief in the form of a unilateral credit is available under section 133 of the ITA if there is no DTA between Malaysia and the other country. The computation of this credit is as follows:

Malaysian tax payable before bilateral credit/unilateral credit	X	² Foreign income charged to tax twice (statutory income) Total income
Or		
½ X foreign tax charged in respect of the foreign income charged to tax twice, whichever is the lower		
(²Foreign income is income derived from outside Malaysia)		

Case Study 9

Facts of the case: Noni was seconded to the USA

Description of employment	Details
Designation & Nature of job	Geoscientist of a US multinational company based in Malaysia since 1996. Conducts regional and field scale geological and geophysical studies on petroleum. Predicts geological risks for effective acreage acquisition.

Duration working in Malaysia in 2008	7 months.
Duration of overseas duties in 2008	5 months in the USA.
Duties Overseas	Undergo a training programme on the latest technology acquired by the parent company in the USA that is related to the job function in Malaysia.
Direction and control	Reports on the progress of the training are sent to the employer in Malaysia.
Remuneration	Monthly remuneration was paid and borne by the employer in Malaysia.

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

Factors and circumstances to consider	Yes/No
<i>Did the employee exercise her employment in Malaysia prior to being sent overseas to work?</i>	Yes
<i>Were the duties performed overseas connected to or part and parcel of the employment duties performed in Malaysia?</i> <i>The overseas training programme was connected to the job functions carried out in Malaysia. The latest technology acquired from the training will be used as part and parcel of Noni's geological and geophysical studies on petroleum.</i>	Yes
<i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i> <i>The overseas training was related to the job functions carried out in Malaysia and is not independent of the duties in Malaysia.</i>	Yes

<i>Were the overseas duties temporary?</i>	Yes
<i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i>	Yes
<i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i>	Yes
<i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i>	Yes

- a) *Noni's training in the USA is considered incidental to the exercise of her employment in Malaysia and the employment income is deemed derived from Malaysia.*
- b) *As Noni's overseas training is incidental to her employment in Malaysia, she is taxable in Malaysia on the remuneration received for the period from January to December 2008. As there is no tax treaty between Malaysia and the USA in relation to employment income, Malaysia's domestic tax laws will prevail.*
- c) *Noni's tax liability in the USA would depend on the domestic tax laws of the country. If she is also taxed on the same income, she will not be able to make a claim for the unilateral tax credit in Malaysia as no foreign income was received by her. (Note: For purposes of unilateral credit, foreign income is defined as income derived from outside Malaysia. This differs from bilateral credit where foreign income includes income derived from Malaysia charged to foreign tax).*

Case Study 10

Facts of the case: Mashuri was seconded to Brunei

Description of employment	Details
Designation & Nature of job	Civil engineer of an engineering company in Malaysia since 2001. Plan, evaluate and implement maintenance, consultancy to serve the needs of the company.
Duration of stay in Malaysia in 2008	2 months.

Duration of overseas duties in 2008	10 months.
Duties overseas	The Brunei company and the company in Malaysia entered into an agreement whereby the Malaysian company provides services in the form of expertise. Mashuri's duties in Brunei and Malaysia are similar.
Direction and control	Company in Brunei was responsible for the decision making and issued all the instructions.
Remuneration	Monthly remuneration was paid by the employer in Malaysia. The company in Brunei paid a lump sum fee to the company in Malaysia which included the remuneration of employees.

The determination of whether the duties performed overseas are incidental to the exercise of the employment in Malaysia are based on the following factors and circumstances that have been considered collectively:

Factors and circumstances to consider	Yes/No
<i>Did the employee exercise her employment in Malaysia prior to being sent overseas to work?</i>	Yes
<i>Were the duties performed overseas connected to or part and parcel of the regular employment duties performed in Malaysia?</i> <i>The duties performed as an engineer in both Malaysia and overseas were similar. The work done in Brunei was related to a project that was not connected to the employer in Malaysia as the company in Brunei bore all the risks and enjoyed the benefits from the work done in Brunei.</i>	No
<i>Were the duties performed overseas to further the purpose of the employer in Malaysia?</i> <i>The duties performed overseas were independent of the duties in Malaysia as the company in Brunei was responsible for all the decision-making of the job done in Brunei.</i>	No

<p><i>Were the overseas duties temporary?</i></p> <p><i>The overseas duties are temporary since Mashuri continued to work with the same employer on her return to Malaysia after the completion of her secondment to Brunei.</i></p>	<p>Yes</p>
<p><i>Did the direction and control of the work performed overseas lie with the employer in Malaysia?</i></p>	<p>No</p>
<p><i>Did the employer in Malaysia bear the remuneration of the employee during the overseas secondment?</i></p>	<p>No</p>
<p><i>Did the risks that were borne and the economic benefits that were received by the employer in respect of the duties performed overseas reflect commercial reality?</i></p>	<p>Yes</p>

Mashuri's overseas duties in 2008 are not considered incidental to the exercise of her employment in Malaysia.

13. **Filing of the Income Tax Forms**

Employees, who become non-residents for the basis year for a year of assessment by virtue of their duties performed overseas, are required to file an Income Tax Form i.e. Form M for that year of assessment. If they remain a tax resident for that year of assessment, a Form BE or Form B (whichever is applicable) should be filed. The Income Tax Form should be furnished to the Director General of Inland Revenue before or on 30 April or 30 June (whichever is applicable) in the year following that year of assessment.

14. **Effective date**

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

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