



Corporate & Commercial Law Update

- ▶ MALAYSIAN CODE ON TAKE-OVERS AND MERGERS 2010
- ▶ SERVICE TAX
- ▶ STAMP DUTY
- ▶ INCOME TAX EXEMPTION

▶ Malaysian Code on Take-overs and Mergers 2010

The Securities Commission ("SC") has issued a new Malaysian Code on Take-overs and Mergers, as well as new Practice Notes, that came into effect on December 15, 2010. The new provisions cater for or relate to the following, among other things :

1. prescriptions in respect of "persons acting in concert", and further provisions for rebutting presumptions as to persons acting in concert;
2. a requirement for advisers to be appointed in connection with a take-over, merger or compulsory acquisition, who can be advisers, and the duties of advisers;
3. the conduct of persons involved in a take-over, merger or compulsory acquisition;
4. the various situations which trigger the obligation on the part of both the offeror and the offeree to make an announcement of the possibility of a take-over offer being made, including the obligation to make a brief announcement that negotiations are taking place and to make a monthly announcement setting out the progress on the negotiations;
5. a potential offeror, a person acting in concert with the potential offeror or a person subsequently acting in concert with the potential offeror shall not, within 6 months after making an announcement that he does not intend to make a take-over offer or there is no possible take-over offer by him, undertake any of the following:
 - (a) announce a take-over offer or possible take-over offer for the offeree;
 - (b) acquire any voting shares or voting rights of the offeree if any such person would thereby become obliged to make a take-over offer;
 - (c) procure an irrevocable commitment to acquire shares of the offeree, which would in aggregate carry more than 33% of the voting shares or voting rights of the offeree;
 - (d) make any statement which raises or confirms the possibility that a take-over offer may be made for the offeree; or
 - (e) take any steps in connection with a possible take-over offer for the potential offeree where knowledge of the possible take-over offer may be extended outside those who need to know in the potential offeror and its advisers;



6. the various situations which trigger (and do not trigger) a mandatory offer to be made and the cases where the SC may consider an application for an exemption from making the mandatory offer (for example where the offeror intends to proceed with a compulsory acquisition under section 180 of the Companies Act 1965);
7. the provisions of the Code from which an offeror may apply for exemption in a case where the take-over is to be effected by way of a scheme of arrangement and the circumstances when the SC may grant an exemption (by virtue of an amendment in 2010 to the Capital Markets and Services Act 2005, a take-over made by way of an arrangement or reorganization that involves the voting shares or voting rights of a listed company comes within the meaning of "take-over offer" in the CMSA);
8. where a take-over offer is effected by way of a scheme of arrangement, compromise, amalgamation or selective capital reduction, the following requirements are to be satisfied:
 - (a) the scheme is approved by at least 50% in number and 75% in value to the votes attached to the disinterested shares that are cast either in person or by proxy at a duly convened meeting of the holders of the disinterested shares; and
 - (b) the number of votes cast against the resolution to approve the scheme at such meeting is not more than 10% of the votes attaching to all disinterested shares of the total voting shares of the offeree.

► Service Tax

With effect from January 1, 2011, by virtue of an amendment to the **Service Tax (Rate of Tax) Order 2009**, the rate of tax on taxable services, other than taxable service relating to credit card and charge card services, has been increased from 5% to 6% of the price, charge or premium of the taxable service. Further, by virtue of an amendment to the 2nd Schedule to the **Service Tax Regulations 1975** which also came into force on January 1, 2011, paid television broadcasting services are now subject to service tax.

According to the Guidelines for the Implementation of Service Tax issued by the Royal Malaysian Customs :

- (a) taxable services that were rendered before January 1, 2011 should be taxed at the old rate of 5%, regardless of the date of receipt of payment for such services;
- (b) taxable services rendered on or after January 1, 2011 should be taxed at the new rate of 6%. However, if payment (whether partial or full payment) for services rendered on or after January 1, 2011 was received before January 1, 2011, the rate of tax to be levied on that payment received is 5%, whilst any payment received on or after January 1, 2011 should be taxed at 6%;
- (c) with regard to paid television broadcasting services, 6% service tax is chargeable if an invoice is issued on or after January 1, 2011. If it is issued before that, no service tax is chargeable even if the billing period includes the period after January 1, 2011;
- (d) as for postpaid telecommunication services, the new rate of 6% will only be imposed for bills issued on or after February 1, 2011 due to the fact that bills issued at any time in January 2011 will apply to services rendered during a period that includes December 2010.



► Stamp Duty

1. By virtue of the **Stamp Duty (Remission) (No. 2) Order 2010**, there will be 50% remission of stamp duty chargeable on any loan agreement executed between a purchaser who is a Malaysian citizen, named in the Sale and Purchase Agreement, and :
 - a bank; or
 - a financial institution; or
 - an insurance company registered under the Insurance Act 1996; or
 - a co-operative society registered under the Co-operative Societies Act 1993; or
 - an employer under an employee housing loan scheme,to finance the purchase of only one unit of residential property costing not more than RM350,000 provided that —
 - (a) the Sale and Purchase Agreement is executed between January 1, 2011 and December 31, 2012;
 - (b) the purchaser does not own any other residential property at the date of execution of that Sale and Purchase Agreement; and
 - (c) the application for remission of stamp duty may only be made once.
2. Further, under the **Stamp Duty (Remission) (No. 3) Order 2010**, there will be 50% remission of the stamp duty chargeable on any instrument of transfer for the purchase by the above said Malaysian citizen of the said residential property costing not more than RM350,000, subject to the same conditions as set out in paragraphs 1(a) – (c) above.
3. By virtue of **Stamp Duty (Remission) (No. 4) Order 2010**, the stamp duty on a service agreement under item 22(1)(b) of the First Schedule to the Stamp Act 1949, executed on or after January 1, 2011, shall not exceed 0.1% of the sum(s) of money relating to such service agreement.

The service agreement to which the said Order applies is an agreement executed by :

- (a) a main service provider with a person other than a Ruler of a State or the Government of Malaysia or of any State or local authority awarding the undertaking; or
- (b) a sub-provider of service with the main service provider where the main service provider has entered into an undertaking with a Ruler of a State or the Government of Malaysia or of any State or local authority awarding the undertaking.

Notwithstanding the above, where the main service provider under paragraph 3(a) or the sub-provider of service under paragraph 3(b) further executes a service agreement with another sub-provider of service and so on, the maximum amount of stamp duty that is chargeable upon that service agreement shall be RM50.00.

To obtain the benefit of Stamp Duty (Remission) (No. 4) Order 2010, the service agreement by the sub-provider of service or subsequent sub-provider of service must state :



- (1) the names of the parties and the date of execution of the agreement referred to in paragraph 3(a) or paragraph 3(b), as the case may be;
- (2) the subject matter of the agreement; and
- (3) that such agreement referred to in paragraph 3(a) or paragraph 3(b) had been duly stamped at a rate of 0.1%.

► Income Tax Exemption

Income Tax (Exemption) (No. 2) Order 2010 was issued in late December 2010 and has effect from the year of assessment 2011 until the year of assessment 2012.

Under the said Order, a company incorporated under the Companies Act 1965 and resident in Malaysia in the basis period for a year of assessment is exempted from the payment of income tax in respect of income received from the sale of certified emission reductions. The company must maintain a separate record for the income exempted under the Order.

- A “certified emission reduction” means a Kyoto Protocol unit equal to one metric tonne of carbon dioxide equivalent, calculated in accordance with Kyoto rules, issued for gas emission reductions from an activity of clean development mechanism project approved by the Ministry of Natural Resources and Environment.
- The “income” referred to means the gross income from the sale of certified emission reduction units less an amount equal to the expenditure, not being capital expenditure, incurred by the company for the purposes of obtaining certified emission reductions.
- The “expenditure” referred to is deemed to be incurred in the basis period for a year of assessment in which the income from the sale of certified emission reductions is received by the company.