



INLAND REVENUE BOARD MALAYSIA

DIRECTOR'S LIABILITY
PUBLIC RULING NO. 2/2019

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INLAND REVENUE BOARD OF MALAYSIA

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DIRECTOR GENERAL'S PUBLIC RULING

Section 138A of the Income Tax Act 1967 (ITA) provides that the Director General is empowered to make a Public Ruling in relation to the application of any provisions of the ITA.

A Public Ruling is published as a guide for the public and officers of the Inland Revenue Board of Malaysia. It sets out the interpretation of the Director General in respect of the particular tax law and the policy as well as the procedure applicable to it.

The Director General may withdraw this Public Ruling either wholly or in part, by notice of withdrawal or by publication of a new Public Ruling.

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

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1. Objective

The objective of this Public Ruling (PR) is to explain the liabilities of a company director in respect of the company's tax i.e. -

- (a) any tax that is due and payable by a company; and
- (b) any debt that is due and payable by the company as an employer in relation to tax deductions from emoluments and pensions under the Monthly Tax Deduction (MTD).

2. Relevant Provisions of the Law

- 2.1 This PR takes into account laws which are in force as at the date this PR is published.
- 2.2 The provisions of the Income Tax Act 1967 (ITA) related to this PR are sections 75A, 90, 103,104, 106, 107 and subsections 139(7).

3. Interpretation

The words used in this PR have the following meaning:

- 3.1 "Ordinary share capital" means all the issued share capital of a company, other than capital the holders of which have a right to a dividend at a fixed rate and have no other right to share in the profit of the company .
- 3.2 "Director of Immigration" means the Director of Immigration in Sabah, Sarawak or Peninsular Malaysia.
- 3.3 "Commissioner of Police" includes a Chief Police Officer.
- 3.4 "Stoppage order" means preventing a person from leaving Malaysia if he fails to pay all the taxes, sums and debts so payable.
- 3.5 "Associate" in relation to a person for the purposes of this PR means -
 - (a) A person in any of the following relationships to that person, that is to say, husband or wife, parent or remoter forebear, child or remoter issue, brother, sister and partner; or
 - (b) 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.

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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 territory outside Malaysia and a business trust.

4. Introduction

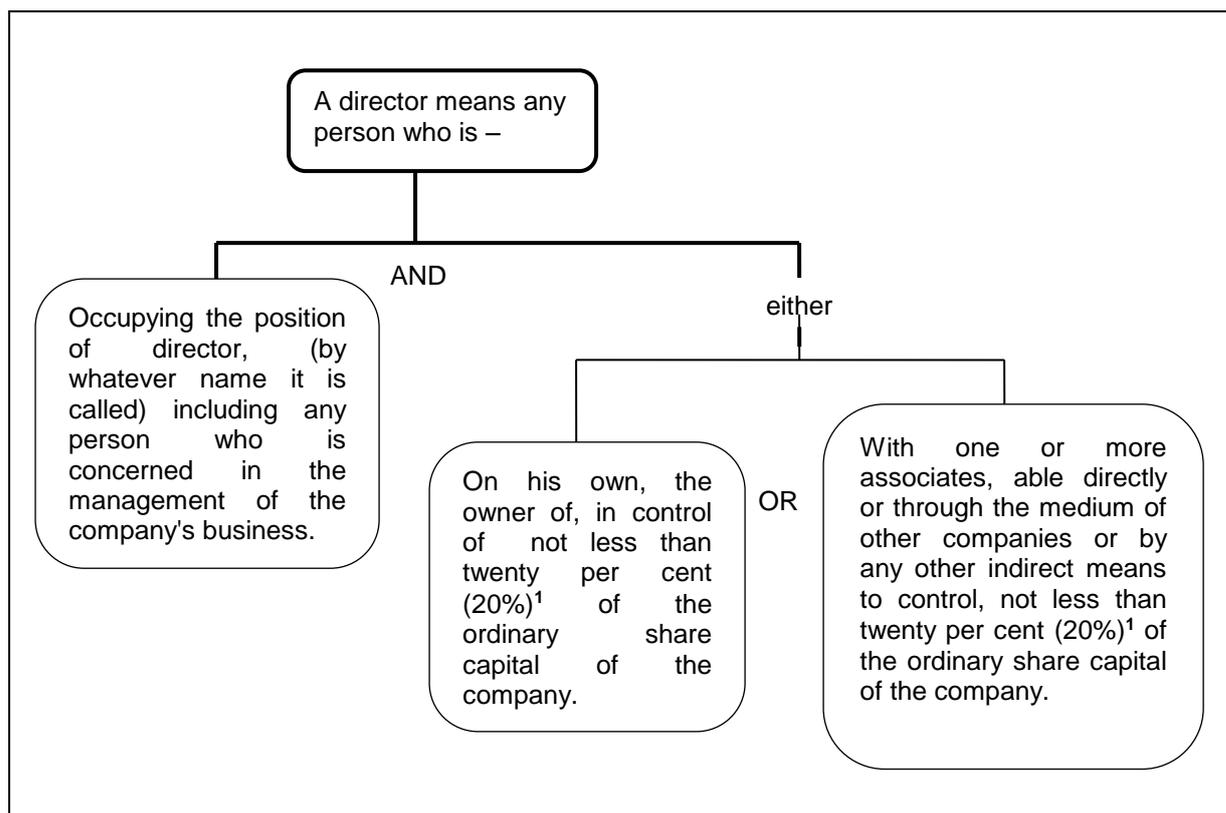
4.1 Section 75A of the ITA provides for a director of a company to be responsible for any tax or debt that is due and payable by the company, and the tax owing or debt is recoverable from the company's directors.

4.2 Any person occupying the position of a director during the period in which the tax or debt is liable to be paid is jointly and severally liable for any tax or debt that is due and payable by the company.

4.3 The words ‘jointly and severally’ means that action can be taken jointly on the company and its director, or separately on the directors of a company who are liable for the tax or debt payable of the company.

5. Meaning of a Director

5.1 Pursuant to subsection 75A(2) of the ITA, the meaning of a director can be summarised as follows:



Note:

¹Prior to 24.1.2014, the ordinary share capital requirement was more than 50%.

- 5.2 If a person who is holding the post of director (by whatever name it is called), regardless of whether he actually performs any of the functions of a director, he is a director for income tax purposes if he also satisfies the condition in paragraph 5.3 and 5.4.
- 5.3 If a person has the powers of a director but is not given the title of a director, he is to be regarded as a director for income tax purposes.
- 5.4 If a person is not called a director but he is involved in the management of the company's business and either, on his own or with an associate, holds at least 20% of the company's ordinary share capital, then he is to be regarded as a director for income tax purposes.

Example 1

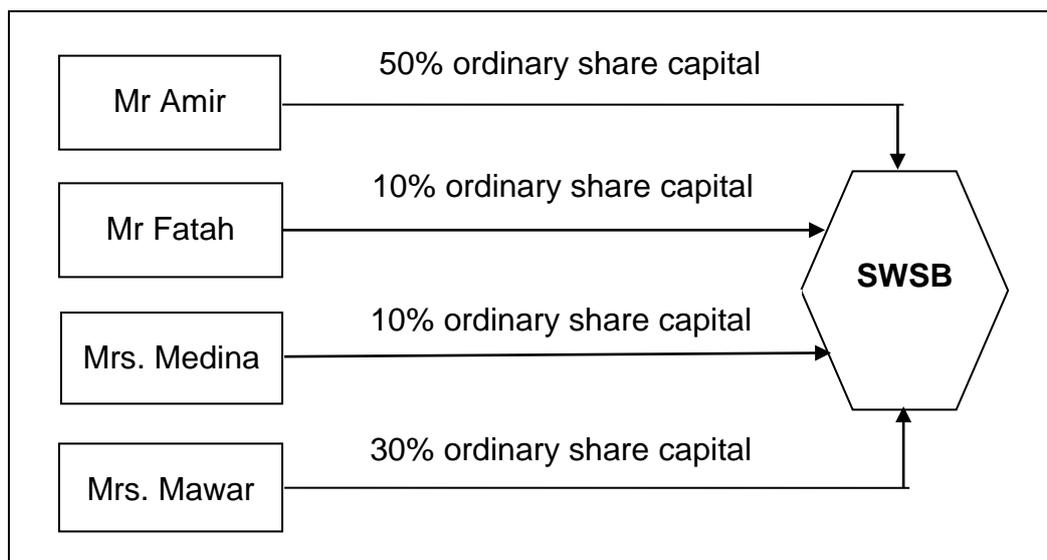
Ms Amyza and Ms Ayuni were appointed as Managing Director and Operations Manager respectively in Valentia Sdn Bhd (VSB) from 2.5.2018. They own 19% and 55% of the ordinary share capital in VSB, respectively.

Ms Ayuni is a director for the purposes of section 75A of the ITA as she owns 55% of VSB's ordinary share capital which is not less than 20%.

Ms. Amyza is not a director for the purposes of section 75A of the ITA as the ordinary share capital owned by her is less than 20%.

Example 2 (Direct shareholding)

Holding of ordinary share capital in Snow-White Sdn Bhd (SWSB) for the year ending 31.3.2018 is as follows:



The above directors have no family ties with each other.

Mr. Amir and Mrs. Mawar are directors of SWSB for the purposes of section 75A of the ITA because each of them directly holds more than 20% of the ordinary share capital in SWSB.

Mr. Fatah and Mrs. Medina are not directors for the purposes of section 75A of the ITA as the ordinary share capital directly held by each of them in SWSB are less than 20%.

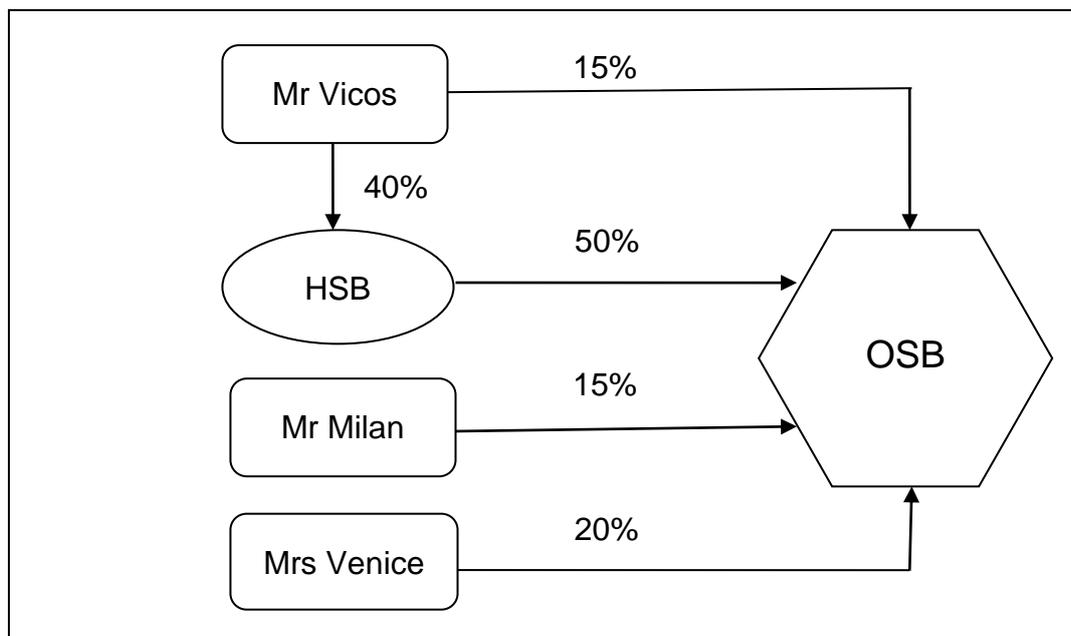
Example 3

Same facts as in Example 2 except that Mr Fatah and Mrs. Medina are a married couple.

Mr. Fatah and his associate Mrs. Medina have ordinary share capital amounting to 20%. Therefore, Mr Fatah and Mrs Medina are the directors of SWSB for the purpose of section 75A of the ITA as they jointly hold not less than 20% of the ordinary share capital in SWSB.

Example 4 (Indirect shareholdings)

The holding of ordinary share capital in Ovaltino Sdn Bhd (OSB) by Mr. Vicos, Mr. Milan, Mrs. Venice and Horlic Sdn Bhd (HSB) in terms of percentage are as follows –



Mr Vicos, Mr Milan and Mrs. Venice were appointed as directors of OSB Company from 1.8.2017.

Mr Milan is not a director of OSB Company for the purposes of section 75A of the ITA as he does not fulfill the condition of owning "not less than 20% of the ordinary share capital".

Mrs Venice is a director of OSB Company for the purposes of section 75A of the ITA as she owns 20% of ordinary share capital on her own.

Mr Vicos is also a director of OSB Company for the purposes of section 75A of the ITA as he owns 35% of ordinary share capital computed as follows:

Shares owned on his own behalf - directly	15%
Add:	
Shares owned through an intermediary, HSB Company (40% X 50%) – indirectly	<u>20%</u>
Shares owned directly and indirectly	<u>35%</u>

6. Recovery of a Company's Tax and Debt from Directors

A director who holds 20% or more of ordinary share capital in a company will be held liable for -

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- (a) the payment of corporate income tax; and
- (b) Monthly Tax Deduction (MTD).

The Director is jointly and severally liable in respect of the company's tax and any debt that is due and payable.

Example 5

Mr. Ismail, Mr. Akmal and Mrs Amy are the owners and directors of a Company, Italian Design Sdn Bhd by owning 50%, 35% and 15% of the company's ordinary share capital respectively. The directors are not associates as explained in paragraph 3.5 under the 'Interpretation' in this PR.

The Company failed to pay the income tax due and failed to remit the amount deducted from the remuneration of its employees who are subject to the MTD.

Recovery action under section 75A of the ITA that can be taken against two of the company's directors that is Mr. Ismail and Mr Akmal are as follows –

- (a) recover the company's income tax that is owing; and
- (b) recover the MTD that the company failed to remit.

Although Mrs Amy is a director of the company but the outstanding taxes cannot be recovered from her because the shares held by her are less than 20% of the company's ordinary share capital.

7. Company Directors Who are Liable

A company director who is liable under section 75A of the ITA is -

- (a) a person who is a director of a company during the period in which tax was due and payable by the company i.e. from the date the notice of assessment is served or the notice of assessment is deemed to have been served on the company.

Example 6

Oxford Sdn Bhd (OSB) with an accounting period ending on 31 January, has furnished the Income Tax Return Form (ITRF) for the Year of Assessment 2017 on 30.6.2017. Thus, the date of notice of assessment is served on 30.6.2017 or the notice of assessment is deemed to have been served on 30.6.2017.

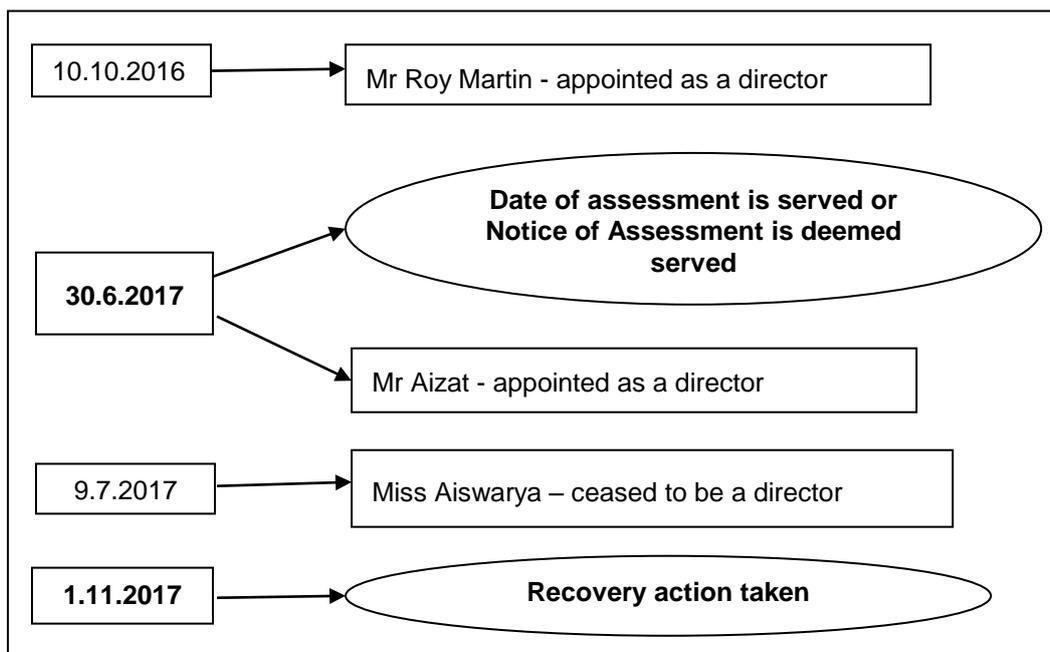
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However, OSB failed to pay the balance of the tax on the date that was specified. Thus recovery action of the tax due and payable was taken on 1.11.2017.

The following are the details of appointment and termination of the directors of OSB and their ordinary share capital in OSB –

Name of Directors & ordinary share capital	Date of appointment of director	Remark
Mr Roy Martin 50%	10.10.2016	Remains as a director after 1.11.2017
Miss Aiswarya 25%	20.10.2016	Ceased to be a director on 9.7.2017
Mr Aizat 25%	30.6.2017	Remains as a director after 1.11.2017

Summary of appointment and termination of the directors of OSB



The directors of OSB who are liable under section 75A of the ITA are -

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- (i) Mr Roy Martin – he was a director at the time the tax was due and payable and remains as a director on the date action to recover the tax was taken.
 - (ii) Miss Aiswarya – although she ceased to be a director before recovery action was taken but she was a director of the company during the period in which tax was due and payable.
 - (iii) Mr Aizat – although he was appointed as a director on the same date on which the notice of assessment was served or notice of assessment was deemed to be served, he was a director of the company during the period in which tax was due and payable.
- (b)** a person who is the director during the period in which the debt is liable to be paid by that company. Therefore, action can only be taken against the director of a company during the period in which the amount of MTD is due and payable.

Example 7

Aleeya Qaseh Sdn Bhd (AQSB) runs the business of selling and arranging flowers from 2.1.2018. Mr Amin and Mrs Qaseh are the owners and directors of AQSB, where each owns 60% and 40% of the ordinary share capital in the company respectively. The company employed three employees since the company commenced operations. All the three employees are subject to MTD under the Income Tax Rules [Deduction From Remuneration] [Amendment] 2014.

The MTD that should be made by the company for the three employees for 2018 was RM4,300. However, AQSB failed to remit the amount that had been deducted from the employee's remuneration to the IRBM for that year.

Recovery of the MTD owing for the year 2018 can be taken against both directors of AQSB as both were directors during the period in which the MTD was due and payable.

Example 8

MTD for the month March 2018 was payable on or before 15.4.2018.

MTD became due on 16.4.2018.

The directors of company who are be liable for the amount of MTD owing for March 2018 are the directors of the company during the period the MTD for March 2018 was payable and became due on 16.4.2018.

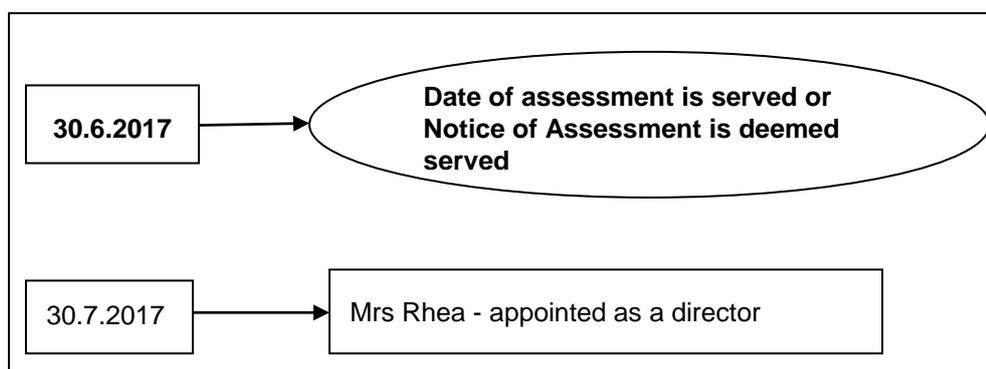
8. Company Directors Who are Not Liable

- (a) A person who is a director of a company after the notice of assessment is served or the Notice of Assessment is deemed to have been served.

Example 9

Same facts as in Example 6 except that Mrs. Rhea was appointed as a new director to replace Miss Aiswarya on 30.7.2017. She holds 25% of the ordinary share capital in the company.

Recovery action cannot be taken against Mrs. Rhea as the date of her appointment as a director was after the notice of assessment is served or the notice of assessment is deemed to have been served.

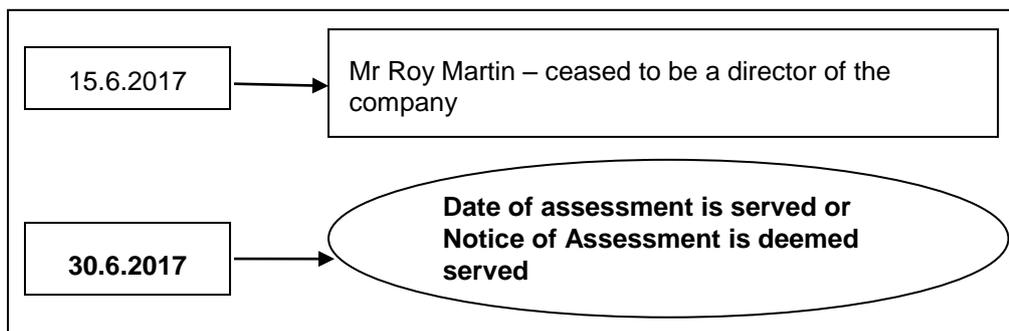


- (b) A director of a company who ceases to be a director before the notice of assessment is served or the Notice of Assessment is deemed to have been served.

Example 10

Same facts as in Example 6 except that Mr. Roy Martin ceased to be the director of the company on 15.6.2017.

Recovery action cannot be taken against Mr. Roy Martin as he is no longer a director of the company when the notice of assessment is served or the notice of assessment is deemed to have been served.



- (c) A director of a company which has taxes or debts arising after the winding up of the company commences.

A company which is **under winding up**, action cannot be taken against a company's directors if taxes or debts arising become due and payable. This is because the directors of the company are no longer liable for the taxes or debts arise when the company is placed under the winding up.

Note: Under winding up means the period after the winding up of the company commences until the completion of the winding-up and the company ceases to exist.

Example 11

Firas Holdings Sdn Bhd (FHSB) was under voluntary wound up on 10.1.2019 and a liquidator was appointed on the same date. After the company was wound up, tax amounting to RM50,000 was raised.

Recovery action cannot be taken against FHSB's directors as they are no longer liable for taxes or debts arising after the company is wound up.

9. Tax Recovery Action

Action to recover a company's taxes or debts that are due and payable can be taken against the directors of a company under the provisions of section 75A of the ITA as follows:

9.1 Preventing Taxpayer from Leaving the Country

- (a) The Director General of Inland Revenue has the power as provided under Section 104 of the ITA to impose stoppage order on a director of a company from leaving Malaysia with the assistance and cooperation

from the Commissioner of Police and Director of Immigration.

- (b) Certificate of Stoppage Order under Section 104 of the ITA (Certificate) is issued legally and in accordance with the provisions of the law as follows:
- (i) The amount claimed is based on the deemed tax assessment or the balance of tax of a deemed tax assessment or tax assessment which is raised by formal assessment. The amount includes an increased amount which has yet to be settled after enforcement action has been taken i.e.–
 - ✓ The imposition of income tax increase for failing to pay within the prescribed period.
 - ✓ A claim or reminder letter is issued to claim the outstanding taxes.
 - ✓ Appropriate action has been taken to contact the directors of the company to claim the outstanding taxes.
 - (ii) The date of issuance of the certificates is the effective date of stoppage order.
 - (iii) The address of the company director on the Certificate shall be the last known address of the company director; and
 - (iv) The Certificate will be served to the company director by personal service or by registered post.
- (c) Stoppage order enforced by the IRBM will be cancelled by a certificate of cancellation of stoppage order if the amount of tax in arrears shown on the Certificate is fully settled.
- (d) For more information, please refer to the PR No. 12/2015 titled "Recovery From Persons Leaving Malaysia".

9.2 Civil Suit under Section 106(1) of the ITA

- (a) A civil suit against both a company and the directors of the company will be taken in the same suit and both will be named as Defendants.
- (b) Before a civil suit action is taken, Notices of Court Action will be sent to the company and the directors of the company concerned.

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- (c) The court documents will be served on the directors of the company personally at his last known address or at the address of the defendant's lawyer.
- (d) A director of a company who satisfies the meaning of a director as referred to in paragraph 5 of this PR and was a director at the time the tax or debt becomes due and payable, shall be liable to a civil action even though -
 - (i) the director has resigned before or during the civil action;
 - (ii) the director has reduced his ordinary share capital to less than 20% before or during the civil action; or
 - (iii) the company has been wound up.

10. Disclaimer

The examples in this PR are for illustration purposes only and are not exhaustive.

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