A11 CAPITAL GAINS TAX

Existing Legislation

Currently, there is no capital gains tax in Malaysia except for Real Property Gains Tax (RPGT) charged on any gain arising from the disposal of real property and shares of a Real Property Company (RPC).

Real property means any land situated in Malaysia and any interest, option or other right in or over such land. Land includes, among others, buildings on land and anything attached to land or permanently fastened to anything attached to land (whether on or below the surface).

An RPC is a controlled company owning real property and/or RPC shares, whereby the defined value of real property and/or RPC shares owned by that company is not less than 75% of the value of its total tangible assets as at 21 October 1988 or as at any subsequent date of acquisition of real property or RPC shares.

Proposed Legislation

It is proposed that the scope of Income Tax Act 1967 be expanded to tax gains or profits from the disposal of capital asset. A summary of the salient points of the proposed provisions are set out below:

***1. Scope of Tax**

(a) Gains or profits from the disposal of capital asset by a company, limited liability partnership, trust body or co-operative society (collectively known as "chargeable person") constitutes taxable non-business income, whereby:

   (i) The term "disposal" means to sell, convey, transfer, assign, settle or alienate whether by agreement or by force of law and includes a reduction of share capital and purchase by a company of its own shares.

   (ii) The term "capital asset" means movable or immovable property including any rights or interests thereof.

   (iii) The term "shares" means stock and shares in a company, loan stock and debentures issued by a company or any other corporate body incorporated in Malaysia, a member's interest in a company not limited by shares (whether or not it has a share capital) and any option or other right in, over or relating to shares as defined above.

(b) Notwithstanding the above, gains or profits from the disposal of capital assets situated in Malaysia are exempted from tax pursuant to Schedule 6 Paragraph 38 of Income Tax Act 1967 except for gains or profits from the disposal of shares of companies incorporated in Malaysia not listed on the stock exchange and shares of controlled companies incorporated outside Malaysia holding real property directly or indirectly in Malaysia. This effectively means that in respect of capital assets situated in Malaysia, only the disposal of unlisted shares of companies incorporated in Malaysia and shares of controlled companies incorporated outside Malaysia which hold real property directly or indirectly in Malaysia are taxable.

With effect from 1 January 2024, the RPC provisions in the RPGT Act 1976 shall not apply to an acquisition or a disposal of any shares by the above chargeable person, except for a Labuan entity as provided under the Labuan Business Activity Tax Act 1990.

2. Special Derivation Rules for Shares of Foreign Controlled Company Holding Real Property Directly or Indirectly in Malaysia

Gains or profits accruing to a person from the disposal of shares of a controlled company (“relevant company”) incorporated outside Malaysia is deemed to be derived from Malaysia if the defined value of real property situated in Malaysia (including any rights or interest thereof) and/or shares of another controlled company owned by the relevant company is not less than 75% of the value of its total tangible assets at the date of acquisition of the shares of the relevant company, whereby:

“defined value” means the market value of real property or the acquisition price of shares of another controlled company;

“value of its total tangible assets” means the aggregate of the defined value of real property (including any right or interest thereof) or shares of another controlled company or both and the value of other tangible assets.

“another controlled company” refers to another controlled company whereby the defined value of the real property situated in Malaysia (including any right or interest thereof) owned by such company is not less than 75% of the value of its total tangible asset.

The shares of the relevant company shall be deemed to be acquired:

(a) on the date the defined value of real property or shares or both owned by the relevant company; or

(b) on the date of acquisition of the shares of the relevant company.

Where (a) applies, the acquisition price of shares of the relevant company shall be deemed to be equal to a sum determined in accordance with the formula:

$$\frac{A}{B} \times C$$

where

A is the number of shares of the relevant company;

B is the total number of issued shares in the relevant company at the date of acquisition of the shares of the relevant company; and

C is the defined value of the real property or shares or both owned by the relevant company at the date of acquisition of the shares of the relevant company.

3. Basis of Assessment

Gains or profits from the disposal of capital asset in the basis period for a year of assessment shall be:

(a) ascertained by reference to each disposal separately; and

(b) treated as a separate source of gains or profits,

from the disposal of capital asset for that year of assessment.

4. Rate of Tax

The following income tax rates shall apply to the gains or profits from the disposal of the capital asset by a company, limited liability partnership, trust body or co-operative society with effect from 1 January 2024:

In the case where	Tax rate of chargeable person
Disposal of capital asset situated in Malaysia which was acquired before 1 January 2024 (Note)	(i) 10% on the chargeable income from the disposal of the capital asset; or (ii) 2% of gross on the disposal price of the capital asset
Disposal of capital asset situated in Malaysia which was acquired on or after 1 January 2024 (Note)	10% on the chargeable income from the disposal of the capital asset
Disposal of capital asset other than mentioned above (e.g. in relation to capital assets situated outside Malaysia)	Prevailing income tax rate of chargeable person on the chargeable income from the disposal of the capital asset

Note: For disposal of shares in Malaysian unlisted companies, capital gains tax to apply from 1 March 2024 (to be legislated via subsidiary legislation).

5. Computation of Adjusted Income

The adjusted income from a source consisting of gains or profits from the disposal of capital asset shall be ascertained based on the following:

a) taking the amount or value of consideration for the disposal of capital asset reduced by:
   - (i) amount of expenditure wholly and exclusively incurred on the capital asset at any time after its acquisition for the purpose of enhancing or preserving the value of the capital asset, being expenditure reflected in the state or nature of the capital asset at the time of the disposal;
   - (ii) amount of expenditure wholly and exclusively incurred at any time after the acquisition of the capital asset in establishing, preserving or defending its title to, or to a right over, the capital asset;
   - (iii) incidental costs of making the disposal; and

b) thereafter, by deducting the amount or value of consideration for the acquisition of the capital asset (together with the incidental costs for such acquisition) less –
   - (i) any sum received by way of compensation for any kind of damage, injury, destruction, dissipation, depreciation or risk of depreciation of the capital asset;
   - (ii) any sum received under a policy of insurance for any kind of damage or injury to or the loss, destruction or depreciation of the asset; and
   - (iii) any sum forfeited to the disposer as a deposit made in connection with an intended transfer of the capital asset.

Incidental costs consist of fees, commission or remuneration paid for the professional services of any valuer, accountant, agent or legal adviser, costs of transfer (including stamp duty), the cost of advertising to find a seller/buyer and valuation fee in ascertaining market value.

Adjusted income computed above shall be treated as chargeable income and such computation shall not apply for election made to be taxed at 2% of gross disposal price from the disposal of the capital asset.

6. Certain Transactions Deemed to be at Market Value

The consideration for the acquisition or disposal of a capital asset shall be deemed to be equal to the market value of the capital asset at the time of the disposal where:

(i) the chargeable person acquires or disposes of the capital asset otherwise than by way of a bargain made at arm's length and, in particular, where the chargeable person acquires or disposes of it by way of gift;

(ii) the chargeable person acquires or disposes of the capital asset wholly or partly for a consideration that cannot be valued;

(iii) the chargeable person acquires a capital asset as trustee for creditors of any person in full or part satisfaction of any debt due from that person or where the chargeable person transfers a capital asset as trustee for the creditors of any person to the creditors in full or part satisfaction of any debt due to the creditors;

(iv) the chargeable person acquires or disposes of a capital asset in a transaction for the transfer of a business for a lump sum consideration;

(v) the disposal of the capital asset is a transaction between connected persons; or

(vi) the capital asset is disposed of by being exchanged for another asset (whether chargeable or not).

7. Market Value

The market value of a capital asset is ascertained by the Director General of Inland Revenue (DGIR) in the following circumstances:

(i) the parties to the disposal of a capital asset are unable to agree on its market value;

(ii) there is only one party to the disposal of a capital asset; or

(iii) the DGIR is of the opinion that the market value of the capital asset as agreed on by the parties to the disposal is incorrect.

In a case where a capital asset is disposed of by being exchanged for another asset with no market value, the DGIR may take the market value of the capital asset disposed of as the consideration.

8. Treatment of Loss

Adjusted loss from disposal of capital asset can be utilised to reduce the adjusted income for subsequent disposal of capital assets in the same basis period for a year of assessment in which the disposal was made. Any unutilized adjusted loss can be carried forward to reduce the adjusted income from the disposal of capital asset for a period of 10 consecutive years of assessment. Any amount or balance of the amount which is not deductible at the end of that period shall be disregarded.

9. Date of Disposal and Acquisition of Capital Asset

A disposal of a capital asset shall be deemed to take place:

(a) where there is a written agreement for the disposal, on the date of such agreement; or

(b) where there is no written agreement, on the date of the completion of the disposal. The date of completion of a disposal means the date on which the ownership of the capital asset disposed of is transferred by the person who disposes the capital asset; or the date on which the whole of the amount or value of the consideration (in money or money's worth) for the transfer has been received by the person who disposes the capital asset, whichever is the earlier. A transfer of ownership of a capital asset is deemed to take place on the date when the last of all such things shall have been done under any written law as are necessary for the transfer of ownership of the capital asset.

Where a contract for the disposal of a capital asset is conditional upon the approval by the Government or a State Government, the date of disposal shall be the date of such approval. If the said approval is conditional, the date of disposal shall be the date when the last of all such conditions is satisfied. The date of acquisition of a capital asset by the acquirer is deemed to coincide with the date of disposal of the capital asset by the disposer.

10. Capital Asset Taken into Trading Stock

If a capital asset acquired or held by a chargeable person is taken into trading stock, there shall be deemed to be a disposal of the capital asset on the date that capital asset is taken into trading stock. The consideration of the capital asset shall be equal to the market value on the date such asset is taken into trading stock.

11. Compliance Requirements

(i) There is no requirement to submit estimate of tax payable or make instalment payments based on such estimate.

(ii) A return in the prescribed form for the disposal of capital asset shall be submitted to the DGIR within 60 days from the date of the disposal of capital asset.

(iii) Tax payment for the disposal of capital asset shall be paid within 60 days from the date of disposal of the capital asset.

Effective Date

1 January 2024.

Likely Tax Effects and Implications

Malaysia is one of the remaining countries in Asia that has yet to implement a comprehensive Capital Gains Tax (CGT) regime. By proposing CGT legislation that is wider in scope compared to the existing RPGT but at this juncture limited to the disposal of unlisted shares of Malaysia incorporated companies and shares of foreign controlled companies with substantial real property holdings in Malaysia and other foreign capital assets, the Government appears to be balancing the need to reduce the country's budget deficit with the need to continue to attract foreign investments into Malaysia.

It was announced in the Budget 2024 that further exemptions may be available for the disposal of unlisted shares arising from approved initial public offerings under Bursa Malaysia and internal group restructuring (within the same group). It is expected that such exemptions may be introduced by way of subsidiary legislation such as a gazette order. In addition, the proposed exemption on remittance of the income received from the disposal of foreign capital asset that meet economic substance requirements is also expected to be covered under subsidiary legislation such as a gazette order.

Although the Government has proposed 1 March 2024 as the commencement date in the Budget speech, the Finance Bill provides for an earlier commencement date of 1 January 2024. It is likely that the earlier date may be to meet the commencement date under the EU Code of Conduct Group (Business Taxation) requirements. It is likely that for disposal of shares in Malaysian unlisted companies, capital gains tax to apply from 1 March 2024 (to be legislated via subsidiary legislation).