Capital Gains Tax

Summary of new provisions

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Introduction
Capital Gains Tax

Presently, there is no Capital Gains Tax (CGT) system in Malaysia, except for the Real Property Gains Tax (RPGT), which solely applies to profits generated from the sale of real estate or shares in a Real Property Company (RPC), with rates ranging from 0% to 30%.

The Budget 2024 initially declared the imposition of Capital Gains Tax (CGT) on gains or profits derived from the disposal of unlisted shares starting from March 1, 2024. However, the recently unveiled Finance (No. 2) Bill 2023 discloses a revised effective date of January 1, 2024, indicating an advancement from the initially stated date of March 1, 2024, as announced in the Budget 2024.

While the Income Tax Act (ITA) theoretically subjects capital gains on all asset types to income tax, a specific section of the ITA exempts the taxation of gains from all capital assets situated in Malaysia. Nevertheless, this exemption does not cover the sale of shares in an unlisted Malaysian company or the disposal of shares by a foreign company, which owns real estate in Malaysia. Such disposals are subject to specific conditions.

While exemptions are granted for gains on the disposal of assets within Malaysia, uncertainty persists regarding the taxation of gains arising from the disposal of capital assets sourced from foreign entities, i.e., assets situated outside Malaysia. This uncertainty is rooted in the divergence between Section 3 of the Income Tax Act (ITA), which taxes foreign source income upon remittance or receipt in Malaysia, and the recently introduced Section 77A(1B) of the ITA, necessitating the submission of the Capital Gains Tax (CGT) return within 60 days of the disposal, coupled with the amended Section 103(12)(aa) specifying that CGT payment is required within 60 days from the disposal date.

The question of when such gains should be taxed—either upon remittance/receipt in Malaysia or within 60 days from the disposal date—awaits further clarification.

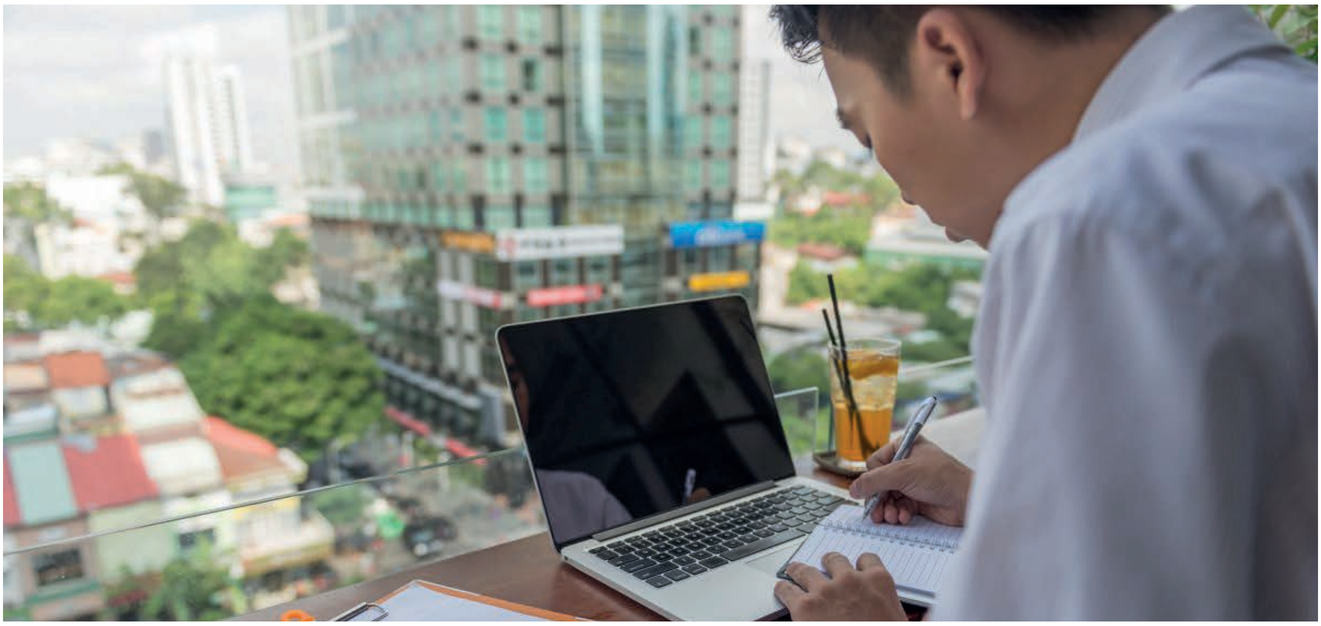
Furthermore, taxpayers are required to thoroughly examine the pertinent Double Taxation Agreements (DTAs), if applicable, to ascertain Malaysia's jurisdictional authority over such gains, given that DTAs supersede domestic law. In instances where the same gain is liable to taxation in both Malaysia and the foreign jurisdiction, the taxpayer may avail themselves of tax credits through bilateral relief under a DTA or unilateral relief under domestic law (in the absence of a DTA or if a limited DTA lacks such relief provisions). These measures serve to mitigate or eliminate the risk of double taxation.

It is now clear that this new Capital Gains Tax (CGT) regime exclusively applies to companies and other corporate entities, encompassing capital gains from the disposal of foreign-sourced assets. Consequently, individual taxpayers remain exempt from CGT on both Malaysian and foreign assets.

As the proposed exemptions for initial public offerings, group restructurings, and gains by venture capital companies, as referenced in the 2024 Budget Announcement remain silence in this Bill, we anticipate that these exemptions will be disclosed at a later date.

Summary of new provisions pertaining to CGT as proposed in Finance (No. 2) Bill 2023 as follows:

Interpretation	New Section in ITA
Capital asset means movable or immovable property including any rights or interests thereof	Section 2(1)(a)
Classes of income on which tax is chargeable Non-business income	Section 4(aa)
Gains or profits from the disposal of capital asset	
Non-business income (a new subsection added)	Section 4B(b)
Gains or profits from the disposal of capital asset other than gains or profits where subsection 24(1) applies	
Rates of tax and basis period	Section 6(1)(q) and Part XXI of Schedule 1
CGT shall be charged on a taxpayer from each disposal of capital asset in the basis period for a year of assessment at the appropriate rate as specified below:- ▪ Capital asset situated in Malaysia acquired date **BEFORE 1 January 2024** The taxpayer may choose between: a. 10% of the chargeable income from the disposal of the capital asset; OR b. 2% on gross on the disposal price of the capital asset. ▪ Capital asset situated in Malaysia acquired date **FROM 1 January 2024** a. 10% of the chargeable income from the disposal of the capital asset. ▪ Capital asset other than those situated in Malaysia At the prevailing income tax rate for Company, LLP, trust body or co-operative society as prescribed under Part I or IV of Schedule 1. Reporting must be done for each disposal transaction.	



Summary of new provisions pertaining to CGT as proposed in Finance (No. 2) Bill 2023 as follows (cont'd):

Type of capital assets and threshold for CGT	Section 15C and Section 65C
Capital assets (i.e., both situated in Malaysia and outside Malaysia) including shares of companies incorporated in Malaysia. Shares of a controlled company incorporated outside Malaysia if it meets a 75% threshold condition. The disposal of the above shares shall be deemed to be derived from Malaysia where the controlled company owns a real property in Malaysia or shares of another controlled company or both. The 75% threshold is met where, at the date of acquisition of the shares of the controlled company; a. The defined value of the real property situated in Malaysia including rights and interest owned by the controlled company is not less than 75% of the value of its total tangible assets; b. The defined value of shares of another controlled company owned by the controlled company is not less than 75% of the value of its total tangible assets. Provided that the defined value of real property situated in Malaysia including rights or interest owned by another controlled company is not less than 75% of the value of its total tangible assets; **OR** c. The defined value of real property situated in Malaysia and shares of another controlled company as mentioned in items (a) and (b) above owned by the controlled company is not less than 75% of the value of its total tangible assets. In the above context, 'shares' includes: ▪ stocks and shares; ▪ loan stock and debentures; ▪ a member's interest in a company not limited by shares; and ▪ any option or right relating to 'shares'. The rule applies notwithstanding that at the time of disposal of shares of the relevant company, the defined value mentioned above drops below the 75% threshold by the time the shares are sold.	

Summary of new provisions pertaining to CGT as proposed in Finance (No. 2) Bill 2023 as follows (cont'd):

Deemed acquisition of CGT shares	**Section 15C(3)**
a. when they meet the criteria listed under Section 15C(2) of the Act; or b. on the date of acquisition of the shares of the relevant company.	
Determining the acquisition price	**Section 15C(4)**
The acquisition price of shares of the relevant company shall: a. where Section 15C(3)(a) of the Act applies, be determined as follows: A / B x C "A" is the number of shares in the relevant company; "B" is the total number of issued shares in the company at the date of acquisition of the shares of the relevant company; and "C" is the defined value of real property or shares owned by the relevant company at the time of acquisition of the shares of the relevant company. b. where Section 15C(3)(b) applies, be determined in accordance with Section 65E(2)(b) or Section 65E(8) of the Act . "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.	
Meaning of disposal	**Section 65C and Section 65F(6)(a)**
▪ 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. ▪ If a capital asset acquired or held is taken into the trading stock, there shall be deemed to be a disposal of the capital asset.	
Category of taxpayer	**Section 65D**
▪ Company (including foreign company) ▪ LLP (including foreign LLP) ▪ Co-operative society (including foreign co—operative society) ▪ Trust body (including foreign trust body)	

Summary of new provisions pertaining to CGT as proposed in Finance (No. 2) Bill 2023 as follows (cont'd):

Determination of adjusted income/(loss)	Section 65E

The amount or value of consideration in money or money's worth for the disposal of the capital asset

Less: Allowable expenses

- Expenditure incurred for the purpose of enhancing or preserving the value of the capital asset, being expenditure reflected at the time of disposal;
- Expenditure incurred in establishing, preserving or defending disposer's title to or right over the capital asset; and
- Incidental cost of disposal, i.e. professional fees, cost of transfer (including stamp duty), legal fees, advertising, broker fees and commission fees.

Less: Consideration in money or money's worth given by or on behalf of the owner for the acquisition of the capital asset.

- Add: Incidental cost of acquisition
- Less:
  - Compensation for any kind of damage to the capital asset or depreciation of capital asset;
  - Sum received under a policy of insurance for damage to the capital asset or depreciation of capital asset; and
  - Amount of deposit forfeited to the disposer.

- Incidental costs refer to the following expenditure that are wholly and exclusively incurred by the disposer for the purposes of the acquisition or disposal:
  - fees, commission or remuneration paid for the professional services of any valuer, accountant, agent or legal adviser;
  - costs of transfer (including stamp duty);
  - in the case of an acquisition, the cost of advertising to find a seller; and
  - in the case of a disposal, the cost of advertising to find a buyer and costs reasonably incurred for the - purposes of this act in making any valuation or in ascertaining market value.

- Adjusted income computed above shall be treated as chargeable income.
- Capital losses are allowed for deductions from the same the ITA source only.
- Unabsorbed capital losses can be carried forward for a period of 10 consecutive YAs.

Summary of new provisions pertaining to CGT as proposed in Finance (No. 2) Bill 2023 as follows (cont'd):

Certain acquisition / disposals shall be regarded at market value	Section 65E

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:

a. the taxpayer acquires or disposes of the capital asset otherwise than by way of a bargain made at arm's length and in particular where the taxpayer acquires or disposes of it by way of gift;

b. the taxpayer acquires or disposes of the capital asset wholly or partly for a consideration that cannot be valued;

c. the taxpayer acquires a capital asset as trustee for the creditors of any person in full or part satisfaction of any debt due from that person or where the taxpayer 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;

d. the taxpayer acquires or disposes of a capital asset in a transaction for the transfer of a business for a lump sum consideration;

e. the disposal of the capital asset is a transaction between connected persons; or

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

The meaning of connected persons	Section 65E

a. A company is connected with another company:

- if the same person has control of both, or a person has control of one and persons connected with him (or he and persons connected with him) have control over the other; or
- if two or more groups of persons have control of each company and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person with whom he is connected.

b. a company is connected with another person if that person has control of it or if that person connected with him together have control of it.

c. any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company.

Any reference above to a person being connected with another shall be taken as meaning that they are connected persons.

Summary of new provisions pertaining to CGT as proposed in Finance (No. 2) Bill 2023 as follows (cont'd):

Disposal and acquisition date	Section 65F

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

- where there is a written agreement for the disposal of the capital asset, on the date of such agreement; or
- where there is no written agreement, on the date of the completion of the disposal of the capital asset.

The date of completion of a disposal means the earlier of the following:-

1. the date on which the ownership of the capital asset disposed of is transferred by the person who disposes the capital asset; or

2. 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.

Where the contract for disposal of a capital asset is conditional and the acquisition or disposal requires the approval by the Government or a State Government, the date of disposal shall be the date such approval is obtained or if the approval is conditional, the date when the last condition is satisfied. The date of disposal for capital asset taken into the trading stock is determined on the date that capital asset is taken into the trading stock.

Where at any time the owner of a capital asset disposes of a part of that capital asset, the amount or value of consideration for acquisition of the capital asset shall be apportioned between that part of the capital asset and the remainder thereof on whatever basis is most appropriate.

Where capital asset is acquired with Syariah financing	Section 65F

Where a capital asset is acquired with financing facility provided by an Islamic bank in accordance with the syariah, the acquisition price of the capital asset shall be:

1. the amount or value of the consideration given by or on behalf of the acquirer to the disposer (other than the Islamic bank); or

2. in the case where the capital asset is owned by such bank, the consideration given to the bank for the acquisition of the capital asset (together with incidental costs) less the sum referred to in Section 65E(2)(b)(i), (ii) or (iii) received or forfeited, as the case may be.

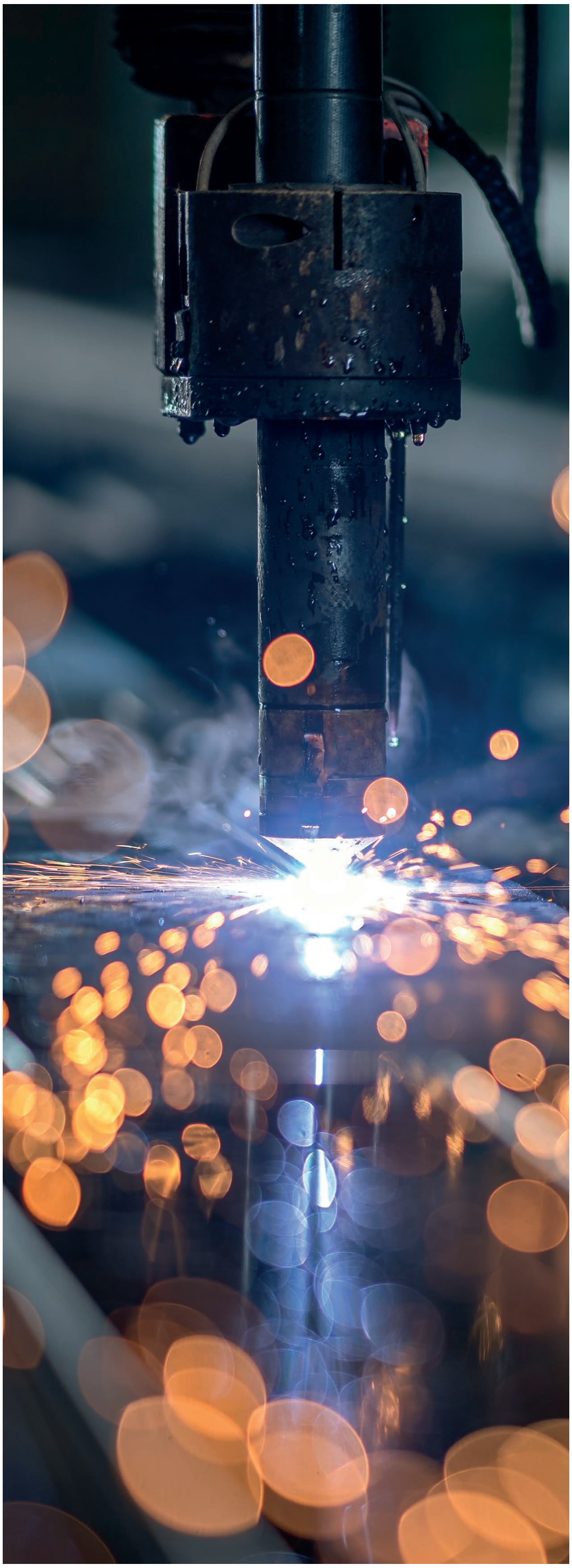
Summary of new provisions pertaining to CGT as proposed in Finance (No. 2) Bill 2023 as follows (cont'd):

Due date for CGT reporting	**Section 77A(1B)**
Submission of the prescribed form through e-Filing within 60 days from the date of disposal of capital asset. The return should be submitted by way of e-filing. A person is also allowed to furnish amended return for the disposal of capital asset under Section 77B of the Act. Where market value of the asset is used for purpose of the return, the market value shall be based on the valuation made by valuer.	
Due date for CGT payment	**Section 103(12)(aa)**
60 days from the date of disposal of capital asset.	

Implications of CGT on other areas

Currently, Section 61(1)(b) of the Act provides that gains from realisation of investment by a unit trust will not be subject to tax in Malaysia. It is proposed that in the case of a unit trust, gains arising from the realisation of investments shall be treated as income of the trust body of the trust as gains or profits from the disposal of a capital asset, provided that such gains are not related to real property as defined under the RPGT Act.

Currently, every company, LLP, trust body or co-operative society is required to furnish an estimate tax payable to the DGIR for each YA. It is proposed that the requirement to submit an ETP for a YA shall not apply to gains or profits from the disposal of a capital asset which is subject to CGT. The amendment comes into operation from 1 January 2024.



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