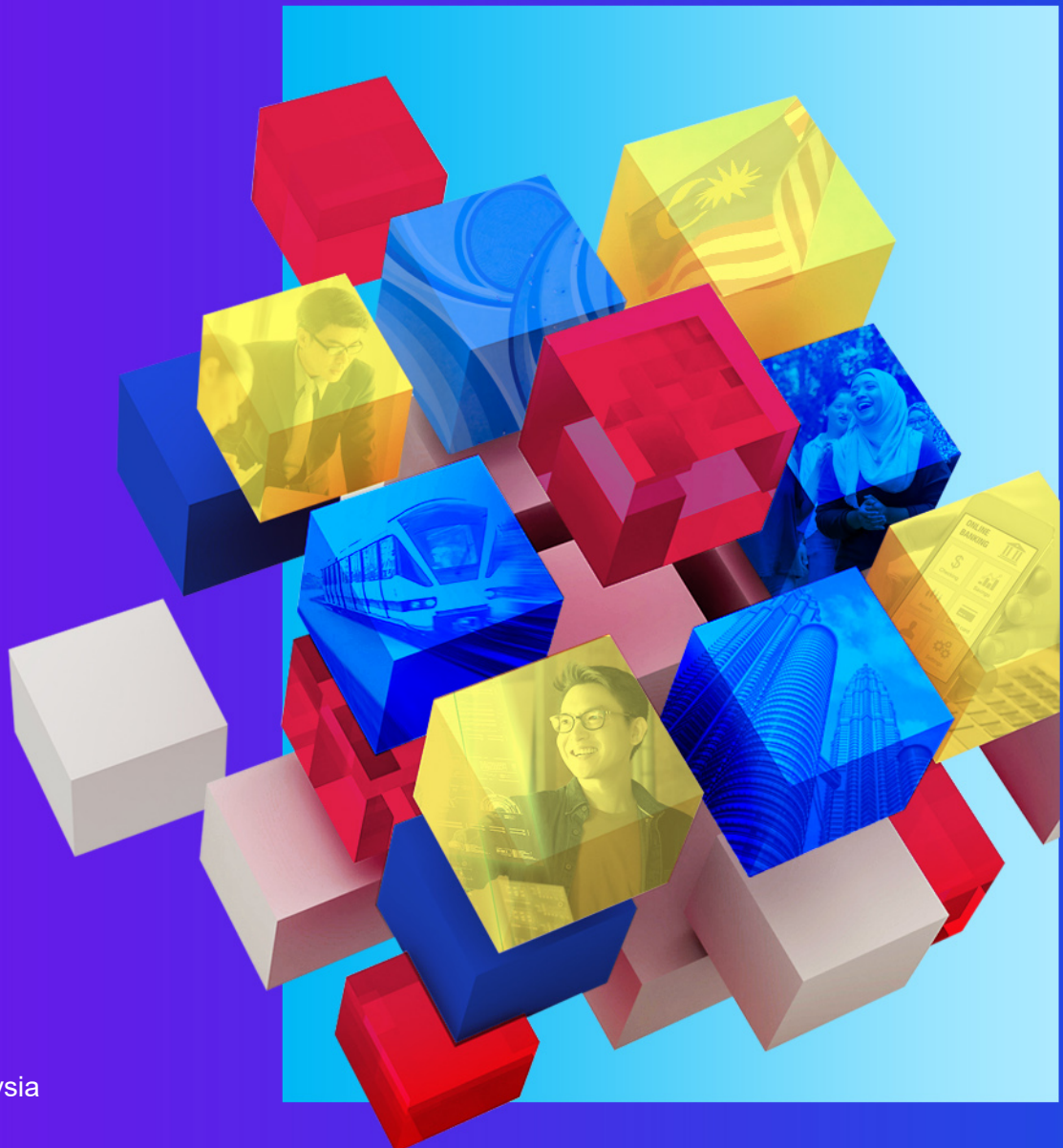




Capital Gains Tax – Friend or Foe

February 2023 update



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KPMG in Malaysia

Overview and Commentary



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Key Message

“Malaysia has traditionally enjoyed a competitive advantage over other jurisdictions in the eyes of investors, in particular foreign investors, by not having a capital gains tax (“CGT”) regime.

Should CGT be implemented in the future, it is hoped that the legislation will be carefully drafted so that Malaysia remains an attractive investment destination for foreign investors and at the same time no taxpayer suffers unduly.”

Capital Gains Tax – Friend or Foe



Malaysia has traditionally enjoyed a competitive advantage over other jurisdictions in the eyes of investors, in particular foreign investors, by not having a CGT regime. A disposal of shares is generally non-taxable in Malaysia, unless it involves shares in a real property company (“RPC”) as defined under the Real Property Gains Tax Act, 1976 or if the disposer is principally engaged in the business of trading in shares.

It is proposed in the re-tableting of Budget 2023 that a form of CGT will be introduced in 2024 on the disposal of shares which are not quoted on Bursa Malaysia (“Unlisted Shares”) by companies. The Prime Minister suggested that

this proposal will be enacted after consultation with the relevant parties.

It should be noted that the idea of introducing CGT has been floating around for many years, with a broad based CGT being argued by opposers as potentially damaging, particularly to the share market and investors at large. Further, there were questions as to how such a CGT would be managed and administered by the Authorities to ensure compliance.

The introduction of this narrower CGT raises the question of equity as disposals of listed shares will not be subject to CGT and surely this will create an uproar within the public domain. CGT will certainly have an impact on organizations intending to undertake a restructuring exercise, especially in the post-Covid 19 era where the economy is recovering and many organizations are contemplating group restructuring exercises to increase overall efficiency. It is therefore hoped that should CGT be implemented, exemptions will be made available for internal group restructurings.

Should CGT on the disposal of Unlisted Shares by companies be introduced by the Government, one hopes that the legislation will be drafted to address the following:-

No	Areas	Comments
1	CGT rates	It is proposed that the CGT rate will be low. However, it is uncertain as to whether the rate will be a fixed rate or progressive tax rates, and whether it will be comparable to the RPGT rates currently in force.
2	Mechanism to determine the capital gain amount	<p>It remains to be seen how the capital gain amount would be determined, i.e., the basis of valuation of shares disposed, availability of any allowable deductions, determination of valuation of shares acquired and shares on hand, especially for companies incorporated at a nominal value or for shares held for a long time.</p> <p>It is important to note that in past internal structurings, many transactions would have been executed at nominal sums which would not have taken into account the actual value of the shares at that point of time. If such value is ignored for CGT purposes, the potential gains subject to CGT may be unreasonably high.</p> <p>In addition, as shares are generally held on a long term basis, it is hoped that the capital gains amount will be adjusted for inflation such that only “real gains” are subject to CGT.</p>
3	Availability of capital losses	Under the corporate income tax regime, business losses are generally available to be set-off against income and any excess losses can be carried forward for future utilization (subject to time limit to carry forward unabsorbed business losses). In view of this, it is only fair that should capital gains be subject to CGT, any capital loss arising from the disposal of Unlisted Shares should also be available to be utilized to set-off future capital gains.
4	Exemptions	It is worth noting whether there will be any CGT exemptions available, for instance, in cases of reconstruction or amalgamation of companies, or transfers of Unlisted Shares within a group.
5	Interaction with the RPGT Act	There should be a clear indication on whether disposal of Unlisted Shares which are regarded as shares in an RPC would fall within the ambit of RPGT or CGT.
6	Interaction with Double Taxation Agreement (“DTA”)	For cross border transactions, it should be considered how CGT would interact with the DTA, i.e. whether there are any reliefs or exemptions available under the DTA.
7	Grandfathering provisions	<p>Grandfathering provisions should be considered to limit the tax cost for bona fide investors who have been holding on to their investments for long periods of time. Ideally, all shareholdings acquired prior to the introduction of the tax should be exempted from CGT.</p> <p>As an alternative, it may also be logical to provide for the “acquisition date” of shares to be no earlier than a particular recent date (eg. 1 January 2020) and that the acquisition price be based on the value of shares at that date rather than the original cost.</p>
8	Disposal	The concept of “disposal” would need to be defined as CGT on transfers that do not generate any cash, for example “share for share swaps” may impose a burden on organizations’ cash flow.

In view of the impending introduction of CGT, companies that intend to undertake any restructuring exercises and/or divest their interest in Unlisted Shares in the near future, should consider accelerating their plans and keep a look out for any developments and updates. It is hoped that should CGT be implemented in the future, careful consideration of all matters concerning interested parties are taken into account so that no taxpayer suffers unduly.

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