Building a better working world

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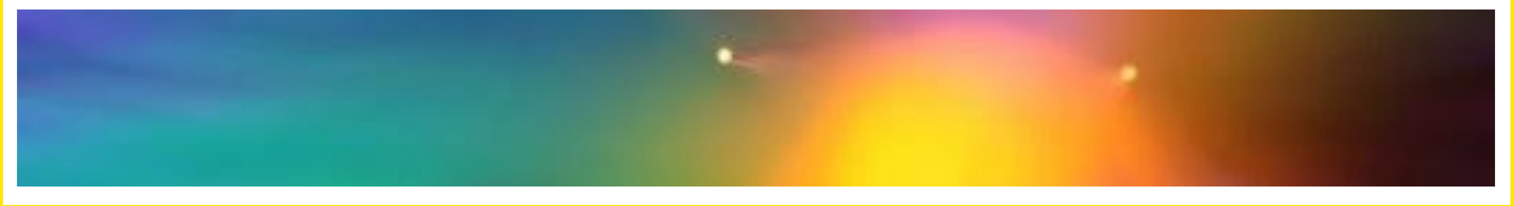
Malaysian developments

Tax incentives for venture capital

Venture capital is early-stage financial capital provided by individuals, companies or venture capital companies (VCCs) to high-potential and potentially higher-risk start-up venture companies (VCs). A VCC is a company incorporated to obtain funds in the form of equity capital or loan capital, which are then invested in the VC in the form of seed capital, start-up or early-stage financing. A venture capital management corporation (VCMC) manages, on behalf of a VCC, the investments of a VC at different stages of the life-cycle, i.e., seed capital, start-up or early-stage financing.

In Budget 2018, to encourage venture capital activities, the Government proposed the following extension and updates to the previous venture capital incentives in Malaysia (see *Special Tax Alert - Highlights of Budget 2018 – Part I*):

- A VCC will be exempted from the payment of income tax in respect of statutory income on all sources of income, other than interest income arising from savings or fixed deposits and profits from *syariah*-based deposits. It was proposed that the investment limit of



a VC at the seed, start-up and early stages be reduced from 70% to 50%.

- A VCMC is exempted from the payment of income tax in respect of statutory income derived from its share of profits received on investments made by the VCC. It was proposed that the income which is exempted be expanded to include income received from management fees and performance fees in managing the VCC funds.
- It was proposed that companies or individuals with business income from investing in VCC funds created by a VCMC be given a tax deduction equivalent to the amount of investment made, restricted to a maximum of RM20 million per year for each company or individual.

To legislate the above, the following Orders and Rules were gazetted on 15 April 2022, and are deemed to be effective from the year of assessment (YA) 2018.

Income Tax (Exemption) (No. 2) Order 2022 [P.U.(A) 115]

The Order provides that a VCC is exempted from the payment of income tax in respect of statutory income on all sources of income, other than interest income arising from savings or fixed deposits and profits from *syariah*-based deposits, commencing from the YA the VCC obtains its first certification from the Securities Commission Malaysia (SC). The first certification received shall not be later than 31 December 2026.

The exemption shall be for a period of five YAs or the YAs equivalent to the remaining life of the fund established for the purpose of investing in a VC, whichever is lesser.

To qualify for the exemption, for each YA in the exemption period the VCC shall obtain a certification from the SC confirming that:

(a) It has invested at least 50% of its invested funds in the form of seed capital financing, start-up financing, early-stage financing or any combination of such financing in VCs,
(b) It was registered with the SC between 27 October 2017 and 31 December 2023, and
(c) It has not invested in a VC which is a related company* of the VCC at the point the first investment is made

*As defined under Section 2(1) of the Promotion of Investments Act 1986 (PIA)

Where a VCC incurs a loss from the disposal of investment in a VC for any YA within the exemption period, the loss can be carried forward to the YA following the post-exemption period to be deducted against the statutory income on all sources of income.

The following terms have been defined in the Order:

(i) Seed capital financing
Financing provided by a VCC to a VC for research, assessment and development of an initial concept or prototype purposes

(ii) Early-stage financing
Financing provided by a VCC to a VC as:
(a) Capital expenditure or working capital to initiate the commercialization of a technology or product,
(b) Additional capital expenditure or additional working capital to increase production capacity, marketing or product development, or

(c) An interim financing for a VC that is expected to be listed on the official list of a stock exchange

(iii) Start-up financing

Financing provided by a VCC to a VC for product development and initial marketing

(iv) VCC

A company which:

(a) Is incorporated under the Companies Act 2016 (CA),

(b) Is registered with the SC, and

(c) Invests in one or more than one VC in the form of seed capital financing, start-up financing or early-stage financing

(v) VC

A company which is:

(a) Incorporated under the CA,

(b) Resident in Malaysia in the basis period for a YA, and

(c) Involved in utilizing the seed capital financing, start-up financing or early-stage financing for:

a. Activities or products promoted under the PIA,

b. Technology-based business activities as specified in the guideline in relation to VC tax incentives issued by the SC,

c. Products or activities that have been developed under the research and development scheme approved by the Ministry of Science, Technology and Innovation, or

d. Products, services or activities that have been developed under the research, development and commercialization grant scheme approved by the Malaysia Digital Economy Corporation Sdn Bhd

The Order also stipulates that the exemption granted does not absolve the VCC from any requirement to submit any return, statement of accounts or any other information as required under the Income Tax Act 1967 (ITA).

With this, the Income Tax (Exemption) (No. 11) Order 2005 [P.U.(A) 75/2005] is revoked effective from YA 2018. However, any exemption which has been granted under P.U.(A) 75/2005 will remain in place for the remaining YAs of the relevant exemption period. Any application for exemption under P.U.(A) 75/2005 which is pending approval, shall be dealt with under P.U.(A) 115.

Income Tax (Exemption) (No. 3) Order 2022 [P.U.(A) 116]

The Order provides that a VCMC is exempted from the payment of income tax in respect of the following statutory income derived from the management of VCC funds:

(a) Share of profits,

(b) Management fees, and

(c) Performance fees (including performance bonus and carried interest)

The income received by the VCMC from a VCC is to be stipulated in the agreement on the management of the investments of the VCC, entered into by both parties.

The exemption applies from YA 2018 to YA 2026.

The following terms have been defined in the Order:

(i) VCC

A company which:

(a) Is incorporated under the CA and registered with the SC,

(b) Invests in one or more than one VC in the form of seed capital financing, start-up financing or early-stage financing, and

(c) Has obtained certification from the SC that the company has complied with the conditions to qualify for the exemption under P.U.(A) 115 (see above)

(ii) VCMC

A company which:

(a) Is registered with the SC,

(b) Has been verified by the SC that for each YA in which the VCMC is exempted from the payment of income tax, the company:

i. Has an adequate number of full-time employees in Malaysia, and

ii. Has incurred an adequate amount of annual operating expenditure in Malaysia

Where a VCMC incurs losses from the management of VCC funds for any YA within the exemption period, the losses can be carried forward to the YA following the post-exemption period to be deducted against the statutory income derived from the management of VCC funds (as specified above).

The VCMC is required to maintain a separate account for income derived from the management of VCC funds. The income derived from the management of VCC funds is to be treated as a separate and distinct source of business income for the VCMC.

With this, the Income Tax (Exemption) (No. 12) Order 2005 [P.U.(A) 77/2005] is revoked effective from YA 2018. However, any exemption which has been granted under P.U.(A) 77/2005 will remain in place for the remaining YAs of the relevant exemption period. In addition, any application for exemption under P.U.(A) 77/2005 which is pending approval shall be dealt with under P.U.(A) 116.

Income Tax (Deduction for Investment in a Venture Company or Venture Capital Company) Rules 2022 [P.U.(A) 117]

The Rules provide that in ascertaining the adjusted income of a company or an individual from its business for a YA, there shall be allowed a deduction equivalent to the:

(a) Value of investment made in a VC, or

(b) Value of investment or RM20 million, whichever is less, made in a VCC

The investment made shall be deemed to be incurred (and allowed a deduction) in the YA the investment has been held for a period of three years from the date the investment was made. The investment holding period is to be certified by the SC.

To qualify for the deduction, the company or individual is required to make the investment between 27 October 2017 and 31 December 2026.

For investments in a VC, the company or individual shall obtain a certification from the SC confirming that:

(a) The investment is in the form of the holding of shares, which at the point of acquisition was not listed for quotation in the official list of a stock exchange,

(b) The investment, in relation to a company, was not made in a VC which is its related company at the point the first investment was made,

(c) The investment was made by providing seed capital financing, start-up financing or early-stage financing, and

(d) The investment was held for at least three years from the date the investment was made

For investments in a VCC, the company or individual shall obtain a certification from the SC confirming that:

(a) The investment is in the form of the holding of shares, which at the point of acquisition was not listed for quotation in the official list of a stock exchange,

(b) i) The investment, in relation to a company, was not made in a VCC which is its related company at the point the first investment was made, and

ii) The investment by the VCC (referred to in Point i) above) is not made in a VC which is

a related company of the first-mentioned company

(c) The investment was made by the VCC in a VC by providing seed capital financing, start-up financing or early-stage financing,

(d) The VCC has maintained, on average over a three-year period (based on its annual audited financial statement), at least 50% of the VCC's investments in one or more VCs, and

(e) The investment was held for at least three years from the date the investment was made

The following terms have been defined in the Rules:

(i) Individual
Individual Malaysian-resident with business income

(ii) Seed capital financing
Financing provided by a company or an individual to a VC for research, assessment and development of an initial concept or prototype purposes

(iii) Early-stage financing
Financing provided by a company or an individual to a VC as:

(a) Capital expenditure or working capital to initiate the commercialization of a technology or product,
(b) Additional capital expenditure or additional working capital to increase production capacity, marketing or product development, or
(c) An interim financing for a VC that is expected to be listed on the official list of a stock exchange

(iv) Start-up financing
Financing provided by a company or an individual to a VC for product development and initial marketing

(v) Company
A company which:

(a) Is incorporated under the CA,
(b) Carries on a business, and
(c) Is a Malaysian-resident

(vi) Related company
As defined under Section 2(1) of the PIA

(vii) VCC
As defined under P.U.(A) 115 (see above)

(viii) VC
As defined under P.U.(A) 115 (see above)

The Rules shall not apply to a VCC that is exempted under P.U.(A) 115 (see above) for the whole of the tax-exempt period.

With this, the Income Tax (Deduction for Investment in a Venture Company) Rules 2005 [P.U.(A) 76/2005] are revoked effective from YA 2018. However, any company or individual who has made an investment for the YAs before YA 2018 and complied with the provisions of the P.U.(A) 117 but has not applied for a deduction under P.U.(A) 76/2005, is entitled to apply for a deduction under P.U.(A) 117.

Extension of East Coast Economic Region (ECER) incentives

As highlighted in an earlier tax alert (see *Tax Alert No. 7/2022*), five of the tax incentives that have been provided to encourage investments in the ECER have been extended by way of statutory orders gazetted on 1 April 2022.

Further to the above, the following ECER incentives have also been extended (see *Tax Alerts No. 13/2016* and *14/2016*):

(a) Stamp Duty (Exemption) (No. 2) Order 2016
The Order provides a stamp duty exemption on any instrument which is chargeable with *ad*

valorem duty for transfer of real property or lease of land or building used for the purpose of carrying on a qualifying activity (as specified in the Schedule of the Order) in the ECER.

(b) Income Tax (Exemption) (No. 9) Order 2016
The Order provides a 100% income tax exemption on the statutory income derived from the following qualifying activities by a qualifying development or park manager:

- For a development manager – provision of management, supervisory or marketing services relating to the development of an industrial park or a free zone
- For a park manager – provision of park management services including maintenance, marketing and rental of common facilities and utilities services in the industrial park or free zone

(c) Income Tax (Deduction for Investment in Qualifying Activity) Rules 2016
The Rules provide a tax deduction on the value of investment made in the related company by a qualifying person. The amount that is allowable as a tax deduction is equivalent to the amount incurred by the related company in the qualifying activity (as specified under Rule 2 and the Schedule of the Rules) in respect of which the investment is made.

(d) Income Tax (Deduction for the Sponsorship of Hallmark Event) Rules 2016
The Rules provide a deduction equal to any cash contribution or contribution-in-kind made by a qualifying person in relation to a hallmark event (as defined) held in the ECER. The deduction is capped at RM1 million for each YA.

The incentives are subject to conditions.

To qualify for the above incentives:

- For Item (a), the instrument must have been executed between 13 June 2008 and 31 December 2020.
- For Items (b) to (d), applications must have been made to the ECER Development Council between 13 June 2008 and 31 December 2020.

To legislate the extensions of the above-mentioned tax incentives to 31 December 2022, the following Amendment Orders and Amendment Rules were gazetted on 22 April 2022:

(a) Stamp Duty (Exemption) (No. 2) 2016 (Amendment) Order 2022 [P.U.(A) 123]
(b) Income Tax (Exemption) (No. 9) 2016 (Amendment) Order 2022 [P.U.(A) 124]
(c) Income Tax (Deduction for Investment in Qualifying Activity) (Amendment) Rules 2022 [P.U.(A) 125]
(d) Income Tax (Deduction for the Sponsorship of Hallmark Event) (Amendment) Rules 2022 [P.U.(A) 126]

Tax incentive for equity crowdfunding (ECF)

In Budget 2021, to encourage individuals to invest in ECF, it was proposed that individual investors be given an income tax exemption, subject to limits (see *Take 5: Malaysia Budget 2021*).

To legislate the above proposal, the Income Tax (Exemption) (No. 4) Order 2022 [P.U.(A) 142] was gazetted on 28 April 2022. The Order provides that a qualifying individual is given an income tax exemption in respect of his aggregate income equivalent to 50% of the amount of investment, up to a maximum of RM50,000 for each YA. The amount is limited to 10% of the aggregate income of the qualifying individual for the YA in which the exemption is granted.

The exemption is given in the second YA following the YA in which the investment is made by the qualifying individual.

To qualify for the incentive, the following conditions must be complied with:

(a) The qualifying individual is required to make an investment in:
   i) An investee company between 1 January 2021 and 31 December 2023, and
   ii) The form of holding shares which are paid in cash to the investee company through an ECF platform or through a nominee company

(b) The qualifying individual obtains an annual certification from the ECF operator in relation to the investment and amount of investment. The annual certification needs to be verified by the SC.

(c) The investment is not disposed of, either in full or partially, within two years from the date the investment is made

(d) The qualifying individual does not have a parent (including parent-in-law), child (including stepchild or child adopted in accordance with any law), brother, sister, grandparent, grandchild or spouse who has invested in the investee company

The following terms have been defined in the Order:

(i) Qualifying individual
Individual who is a Malaysian-resident and makes an investment in an investee company

(ii) ECF operator
A company incorporated under the CA and registered with the SC as a recognized market operator to operate an ECF platform in Malaysia under the Guidelines on Recognized Markets issued by the SC

(iii) ECF platform
Online equity fundraising platform operated by an ECF operator

(iv) Nominee company
A company which is:
(a) Incorporated under the CA,
(b) A Malaysian-resident, and
(c) Established by an ECF operator in Malaysia to receive investments from qualifying individuals for investment purposes through an ECF platform into an investee company

(v) Investee company
A company which is:
(a) Incorporated under the CA (excluding an exempt private company specified under Section 2 of the CA),
(b) A Malaysian-resident, and
(c) Hosted on an ECF platform to offer its shares

(vi) Shares
Shares offered on the ECF platform

The Order stipulates that the exemption granted does not absolve the qualifying individual from any requirement to submit any return, statement of accounts or any other information as required under the ITA.

The non-application provisos also stipulate that the Order shall not apply where the qualifying individual has:

(a) Made a claim for deduction under P.U.(A) 117 (see above), or
(b) Been granted exemption under Income Tax (Exemption) Order (No. 3) 2014 [P.U.(A) 167/2014]

The Order is effective from YA 2021.

Updated tax audit frameworks

The Inland Revenue Board (IRB) has issued on its website the following updated tax audit frameworks (TAFs) in Bahasa Malaysia:

(a) Tax Audit Framework, titled "Rangka Kerja Audit Cukai" (replacing the framework dated 15 December 2019)
(b) Tax Audit Framework – Finance and Insurance, titled "Rangka Kerja Audit Cukai Kewangan Dan Insurans" (replacing the framework dated 18 November 2020)
(c) Petroleum Audit Framework, titled "Rangka Kerja Audit Cukai Petroleum" (replacing the framework dated 15 December 2019)

The content of the TAFs are broadly similar to that of the earlier frameworks. Some of the important changes are discussed below.

<u>Voluntary disclosures</u>
The updated TAFs emphasize that voluntary disclosures are only applicable to taxpayers who have submitted their tax returns.

<u>Offences and penalties</u>

- The new TAFs reiterate that in the event any understatement or omission of income is discovered during an audit, a penalty, which is equivalent to the undercharged tax amount (i.e., 100%), may be imposed under Section 113(2) of the ITA or Section 52(2) of the Petroleum (Income Tax) Act 1967 (PITA), whichever applicable. However, for the purpose of the TAFs, the penalty imposed will now be at the following rates instead:
  - First offence: 15%
  - Second offence: 30%
  - Third and subsequent offences: 45%

- The new TAFs stipulate that the rate of penalty to be imposed will be determined based on the record of penalties raised under Section 113(2) of the ITA or Section 52(2) of the PITA (as the case may be) from 1 January 2020 to 30 April 2022.

  If no penalty has been imposed within the said period, any audit findings from 1 May 2022, with penalties imposed under the said sections, will be taken to be the first offence (i.e., penalty rate of 15% will apply).

  However, if the taxpayer has been subject to penalties under the said sections between 1 January 2020 to 30 April 2022, any audit findings from 1 May 2022, with penalties imposed under the said sections, will be taken to be the second offence (i.e., penalty rate of 30% will apply).

- The new TAFs stipulate that for audit findings involving technical adjustments, the penalty that may be imposed due to the omission or understatement of income under Section 113(2) of the ITA or Section 52(2) of the PITA will not apply.

  The TAFs clarify that "technical adjustments" refer to cases which involve different interpretations of the legislation, according to the facts and issues of the particular case. It does not apply to cases where public rulings, guidelines, practice notes, income tax regulations, income tax exemption orders or income tax rules have been issued by the IRB.

- The new TAFs emphasize that if a taxpayer intentionally makes an incorrect return, the penalty to be imposed under Section 113(2) of the ITA or Section 52(2) of the PITA will be at the rate of 100% (i.e., equivalent to the undercharged tax amount).

- The new TAFs stipulate that the penalty rate under Section 113(2) of the ITA and Section 52(2) of the PITA for voluntary disclosures is 15%. However, in

cases where a taxpayer has made a voluntary disclosure, and subsequently makes an additional voluntary disclosure within six months from the due date of the submission of the return form, the penalty rate for the additional voluntary disclosure will be 10%.

Overseas developments

Taiwan amends the documentation requirements for the amortization of goodwill

Taiwan's Ministry of Finance (MOF) issued a new tax ruling on 30 March 2022 with respect to the documentation requirements for goodwill amortization. Although this ruling increases the taxpayers' burden of proof, it provides a consistent approach for the tax authority to review and assess the goodwill and thus, may enhance the tax certainty for mergers and acquisitions (M&A) transactions in Taiwan.

The key features of the new ruling are summarized below.

Detailed discussion

Amortization of goodwill has been a long-lasting controversial issue between the tax authorities and taxpayers in Taiwan. Although Article 96 of the Assessment Rule for Income Tax Return of a Profit-seeking Enterprise and Article 40 of the *Merger and Acquisition Act* provide the basis for taxpayers to amortize goodwill arising from M&A transactions, taxpayers often face challenges in successfully reporting and claiming the amortization of goodwill. The reason behind such challenge is that there is no guidance for tax officers on what needs to be reviewed to confirm the goodwill amortization claimed by the taxpayers. Protracted controversy on this matter led the MOF to issue tax ruling No. 10604699410 in 2018 (the old ruling) as guidance on the documentation required for goodwill amortization. On 30 March 2022, the MOF issued tax ruling No. 11004029020 (the new ruling) to amend these documentation requirements and withdraw the old ruling. The documentation requirements announced in the form of checklists will be the standard to be observed by both tax authorities and taxpayers for goodwill amortization for all the open cases.

The first checklist under the new ruling includes the documentation requirements for the business rationale of the transaction and the elements (i.e., purchase cost and fair market value (FMV) of identifiable net assets) for the calculation of goodwill. The second checklist is specifically for intangibles (other than goodwill) identified in the transaction and the summary of parameters used to evaluate those intangibles.

According to the first checklist, taxpayers should provide a synergy analysis report, documents supporting the decision-making process, the acquisition step-plan, and government approval (where applicable) to support the business rationale behind the transaction. Based on the same checklist, the taxpayers should prepare an appraisal report, due diligence report, and a fairness opinion to prove the reasonableness of the purchase price. For the value of the net identifiable assets, the taxpayers should provide a purchase price allocation report (PPA report) to support the value assigned to each acquired asset and liability. The checklist specifically requests the PPA report to contain certain information, like valuation purpose, assumptions, valuation process, valuation methods, source of information, parameters used for valuation (e.g., internal return rates, the average cost of capital, average return rates of assets) so that the tax authority can determine if the PPA report is reliable.

In the second checklist, the list for identifiable intangibles, taxpayers should state the base of each asset for financial and tax purposes, the methods

used to evaluate each asset, the recognition conditions of each asset, and the reasonableness test and sensitivity test performed on each asset. It is noted that except for patents, trademarks, software, and certain permits granted by law, the other intangible assets listed in the second checklist may not be tax amortizable. Hence, the purpose of this checklist is to help the tax authority assess the reasonableness of the value allocated between goodwill and other intangibles.

In addition to these checklists, the new ruling also suggests that goodwill is usually generated from the economic scale created by a business combination, the opportunity to step into a new market, future economic benefits brought by the acquired new client base or new technology, or simply a margin from the combination of operating assets.

Implications

The new ruling provides guidance for taxpayers and the tax authorities relating to the documentation requirements for the recognition of goodwill. Companies that wish to conduct M&A transactions in Taiwan and recognize goodwill for tax deduction purposes should work closely with their tax professionals to ensure all the information stated in the checklists is available.

In addition to goodwill, the amortization of other intangibles is another challenging issue in Taiwan. The Ministry of Economic Affairs proposed a draft amendment to Article 40-1 of the *Mergers and Acquisitions Act* to allow trade secrets and software to be amortizable, but the amendment is still waiting for approval from the Legislative Yuan. It is notable that the definition of a trade secret is governed by the *Trade Secret Act*, and it is subject to further analysis as to how the identifiable intangible assets recognized under accounting principles can qualify under the definition of a trade secret and enjoy the tax benefit introduced by the amended *Mergers and Acquisitions Act*.

UAE Ministry of Finance releases a consultation document on corporate tax introduction

On 28 April 2022, the United Arab Emirates (UAE) Ministry of Finance (MOF) released a public consultation document on the planned introduction of corporate tax (CT) in the UAE. This follows the 31 January 2022 announcement by the MOF confirming that the UAE will introduce federal CT for the financial years starting on or after 1 June 2023.

The public consultation document sets out the main features of the planned CT regime as well as the principles that were applied in the design of the CT regime. Interested parties are invited to comment on the elements covered in the document, as well as on areas that are not covered by the document.

This is the first formal public consultation process initiated by the UAE Government in respect of the design and implementation of UAE tax legislation. The MOF acknowledges that having an effective consultation with the public, particularly the business community, is essential in shaping a CT regime that is compatible with the UAE's business environment, as this will provide visibility on how the proposed CT regime is perceived by the relevant stakeholders or interested parties.

The public consultation document indicates that it is released to obtain input from interested parties and that it does not reflect the final view of the UAE Government. Moreover, the public consultation document states that it does not exhaustively cover all elements of the planned UAE CT regime.

The MOF invites comments on the public consultation document to be submitted as per the prescribed online submission by 19 May 2022.

Contact details

Principal Tax

Yeo Eng Ping (EY Asia-Pacific Tax Leader)
eng-ping.yeo@my.ey.com
+603 7495 8288

Amarjeet Singh (EY Asean Tax Leader)
amarjeet.singh@my.ey.com
+603 7495 8383

Farah Rosley (Malaysia Tax Leader and Malaysia Global Compliance and Reporting Leader)
farah.rosley@my.ey.com
+603 7495 8254

People Advisory Services

Tan Lay Keng (EY Asean People Advisory Services Leader and Malaysia People Advisory Services Leader)
lay-keng.tan@my.ey.com
+603 7495 8283

Christopher Lim (EY Asean Immigration Leader)
christopher.lim@my.ey.com
+603 7495 8378

Irene Ang
irene.ang@my.ey.com
+603 7495 8306

Business Tax Services

Robert Yoon (EY Asia-Pacific Fixed Assets Services Leader)
(based in Johor)
robert.yoon@my.ey.com
+603 7495 8332

Wong Chow Yang
chow-yang.wong@my.ey.com
+603 7495 8349

Bernard Yap
bernard.yap@my.ey.com
+603 7495 8291

Chan Vai Fong
vai-fong.chan@my.ey.com
+603 7495 8317

Global Compliance and Reporting

Julian Wong (EY Asean Global Compliance and Reporting Leader and EY Asean Managed Services Leader)
julian.wong@my.ey.com
+603 7495 8347

Farah Rosley (Malaysia Tax Leader and Malaysia Global Compliance and Reporting Leader)
farah.rosley@my.ey.com
+603 7495 8254

Janice Wong (EY Asean Japan Business Services (JBS) Tax Leader)
janice.wong@my.ey.com
+603 7495 8223

Asaithamby Perumal
asaithamby.perumal@my.ey.com
+603 7495 8248

Julie Thong
julie.thong@my.ey.com
+603 7495 8415

Liew Ai Leng
ai-leng.liew@my.ey.com
+603 7495 8308

Lee Li Ming
(based in Johor)
li-ming.lee@my.ey.com
+607 288 3299

Linda Kuang
(based in Kuching)
linda.kuang@my.ey.com
+6082 752 660

Mark Liow
(based in Penang)
mark.liow@my.ey.com
+604 688 1899

Jaclyn Tan (Payroll Operate Services)
jaclyn.tan@my.ey.com
+603 7495 8404

Contact details

International Tax and Transaction Services

Yeo Eng Ping
eng-ping.yeo@my.ey.com
+603 7495 8288

Amarjeet Singh
amarjeet.singh@my.ey.com
+603 7495 8383

Sockalingam Murugesan (EY Asean Transfer Pricing Leader and Malaysia Transfer Pricing Leader)
sockalingam.murugesan@my.ey.com
+603 7495 8224

Anil Kumar Puri
anil-kumar.puri@my.ey.com
+603 7495 8413

Chua Meng Hui
(based in Kota Kinabalu)
meng-hui.chua@my.ey.com
+603 7495 8261

Sharon Yong
sharon.yong@my.ey.com
+603 7495 8478

Derek Chan
derek.chan@my.ey.com
+603 7495 8336

Florence Tan
florence.tan@my.ey.com
+603 7495 8585

Gary Ling (Transfer Pricing)
gary.ling@my.ey.com
+603 7495 8388

Hisham Halim (Transfer Pricing)
hisham.halim@my.ey.com
+603 7495 8536

Vinay Nichani (Transfer Pricing)
vinay.nichani@my.ey.com
+603 7495 8433

Indirect Tax

Yeoh Cheng Guan
cheng-guan.yeoh@my.ey.com
+603 7495 8408

Aaron Bromley
aaron.bromley@my.ey.com
+603 7495 8314

Jalbir Singh Riar
jalbir.singh-riar@my.ey.com
+603 7495 8329

Financial Services

Koh Leh Kien
leh-kien.koh@my.ey.com
+603 7495 8221

Bernard Yap
bernard.yap@my.ey.com
+603 7495 8291

Gary Ling (Transfer Pricing)
gary.ling@my.ey.com
+603 7495 8388

Important dates

15 May 2022	Due date for monthly instalments
31 May 2022	6th month revision of tax estimates for companies with November year-end
31 May 2022	9th month revision of tax estimates for companies with August year-end
31 May 2022	Special 11th month revision of tax estimates for YA 2022, for companies with June 2022 year-end
31 May 2022	Statutory deadline for filing of 2021 tax returns for companies with October year-end. A blanket extension of time has been provided until 30 June 2022.
31 May 2022	Extended 2021 tax return filing deadline for companies with September year-end.
15 June 2022	Due date for monthly instalments
30 June 2022	6th month revision of tax estimates for companies with December year-end
30 June 2022	9th month revision of tax estimates for companies with September year-end
30 June 2022	Special 11th month revision of tax estimates for YA 2022, for companies with July 2022 year-end
30 June 2022	Statutory deadline for filing of 2021 tax returns for companies with November year-end. A blanket extension of time has been provided until 31 July 2022.
30 June 2022	Extended 2021 tax return filing deadline for companies with October year-end.

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Publisher:
Ernst & Young Tax Consultants Sdn. Bhd.
Level 23A Menara Milenium
Jalan Damanlela, Pusat Bandar Damansara
50490 Kuala Lumpur
Tel: +603 7495 8000
Fax: +603 2095 7043