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## Capital Gains Tax (CGT) Exemption for Gains from Disposal of Foreign Capital Assets Received in Malaysia

The Income Tax (Exemption) (No. 3) Order 2024 (“Exemption Order”) was gazetted today. The Exemption Order provides exemption from CGT on gains from disposal of foreign capital assets received by companies, limited liability partnerships (LLPs), trust bodies and co-operative societies resident in Malaysia which meet economic substance requirements (ESR) from 1 January 2024 to 31 December 2026.

**Observation:** *The exemption period is timed to end together with the exemptions granted for foreign-sourced income received by resident individuals and foreign-sourced dividend income received by resident companies, LLPs and individuals until 31 December 2026 under the Income Tax (Exemption) (No. 5) 2022 and Income Tax (Exemption) (No. 6) 2022, respectively. Given that these are foreign-sourced in nature, the opportunity to review the extension of these exemptions could be considered collectively in the future.*

### ESR conditions

Similar to the ESR conditions which was introduced for the exemption for foreign-sourced dividend income received by resident companies, LLPs, trust bodies and co-operative societies, the ESR for the exemption from CGT on gains from disposal of foreign capital assets received in Malaysia includes:

- employ an adequate number of employees in Malaysia; and
- incur an adequate amount of operating expenditures in Malaysia.

### ESR conditions subject to Guideline

Similar to the approach adopted for the exemption on foreign-sourced dividend income, the ESR condition is subject to compliance with conditions imposed by the Minister under guidelines to be issued by the Director General of Inland Revenue (“Guideline”).

The Guideline is pending issuance by the Inland Revenue Board (IRB). What amounts to adequate ESR (whether prescribed amounts will be provided) and whether there are additional conditions are therefore pending.

**Comment:** *It is hoped that the IRB would consider granting businesses an avenue to seek confirmation / ruling on the adequacy of their ESR, especially prior to filing of their income tax returns.*

### Deductions in relation to gains exempted

Any deduction in relation to the gains exempted from CGT under the Exemption Order shall be disregarded in computing the chargeable income of the taxpayer.

### Gains from disposal of intellectual property rights (IPR)

Gains from the disposal of IPR are excluded from the scope of the exemption.

**Observation:** *In response to the EU Code of Conduct Group (Business Taxation)'s requirements, several jurisdictions have revised their foreign source taxation/exemption regimes to comply with ESR including nexus requirements in relation to IPR. For example, Singapore has adopted the modified nexus approach to determine the extent to which gains will not be subject to tax when received in Singapore. Unlike these jurisdictions, Malaysia has at this point in time excluded IPR from the scope of the exemption.*

### Non-application

This Exemption Order shall not apply to companies carrying on the business of banking, insurance, sea or air transport.

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