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Exemption from capital gains tax (CGT) and tax on foreign-sourced income (FSI) for unit trusts

Following the announcement by the Finance Minister II early this year that unit trusts will be exempted from CGT and income tax on FSI, the enabling legislations have been gazetted.

Income Tax (Unit Trust) (Exemption) Order 2024

The Exemption Order exempts a resident unit trust (which is not a Real Estate Investment Trust or Property Trust Fund listed on Bursa Malaysia) from CGT on gains or profits from the disposal of the following:

- shares of a company incorporated in Malaysia which is not listed on the stock exchange (“unlisted shares”), or
- shares of a company incorporated outside Malaysia deriving value from real property situated in Malaysia (“section 15C shares”)

The exemption is not applicable to disposals which are taxable as business income.

Loss from disposal shall be set off against gains from subsequent disposals.

Consistent with the announcement, the exemption is effective for disposals made from 1 January 2024 to 31 December 2028.

Comment: The Exemption Order specifies that the exemption does not relieve the unit trust from complying with the “requirement to submit any return”, i.e. the CGT return. Updated guidance from the IRB, either through notes to its CGT return or guidelines is desirable. Based on the current CGT return form, the taxpayer is required to quote the applicable Exemption Order in its CGT return for any disposal that is exempt from tax.

Income Tax (Unit Trust in relation to Income Received in Malaysia from Outside Malaysia) (Exemption) Order 2024

The Exemption Order provides a resident unit trust, in a year of assessment, exemption from income tax on FSI from all sources of income under section 4 of the Income Tax Act 1967 which is received in Malaysia from outside Malaysia. The unit trust is managed by a management company (as defined) but does not include a Real Estate Investment Trust or Property Trust Fund listed on Bursa Malaysia.

In line with the prevailing conditions for tax exemption on foreign-sourced dividend income received by resident companies, unit trusts are required to meet either one of the following conditions to qualify for the tax exemption:

1. Option A - The FSI has been subject to foreign tax, and the minimum headline income tax rate at the source jurisdiction where the income arises is at least 15%; or
2. Option B - The management company of the unit trust must have met economic substance requirements (ESR) in Malaysia, i.e. employed an adequate number of employees and incurred

an adequate amount of operating expenditure.

Consistent with the announcement, the exemption is effective from 1 January 2024 to 31 December 2026.

Similar to the tax exemption of foreign-sourced dividends for resident companies, the above exemption is subject to conditions to be imposed by the Minister via IRB Guidelines.

Comment: The Exemption Order specifies that the ESR condition is to be met by the management company of the unit trust. The IRB, in its latest FSI Guideline dated 20 June 2024, has permitted outsourcing to third parties for the purpose of meeting ESR conditions. A pertinent question is whether these conditions would similarly be adopted for unit trusts. Unless new guidelines will be issued, it is anticipated that the FSI Guideline and the IRB's Guideline on Tax Treatment on Gains Received from Disposal of Foreign Capital Asset will be updated in due course to incorporate the requirements of this Exemption Order.

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