Malaysia

Country M&A team

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</table>
1. **Introduction**

1.1 General information on mergers and acquisitions in Malaysia

In Malaysia, there is no statutory concept of ‘merger’ and the mode of a merger typically involves an acquisition of shares or business assets (and liabilities) of another company. When structuring M&A transactions, in addition to commercial considerations, income tax (including impact on tax incentives) and stamp duty implications should be considered. Non-tax considerations, such as exchange control and thin capitalisation requirements, may also impact a transaction.

1.2 Corporate tax

Malaysia operates a unitary tax system on a territorial basis. Tax residents of Malaysia, whether corporate or individuals, are taxed on income accruing in or derived from Malaysia or received in Malaysia from outside the country. However, resident companies (except for those carrying on banking, insurance, sea or air transport operations) and resident individuals are exempt from income tax on foreign-sourced income remitted to Malaysia. Non-residents are only taxed on income accruing in or derived from Malaysia.

The corporate tax rate for resident and non-resident corporations (including branches of foreign corporations) is 25%. However, resident companies in Malaysia with paid-up capital not exceeding RM2.5m are subject to income tax at the concessionary rate of 20% on chargeable income up to RM500,000. The remaining chargeable income will be taxed at the prevailing corporate tax rate. However, a company which controls or is being controlled directly or indirectly by another company which has a paid-up ordinary share capital of more than RM2.5m will not be eligible for the concessionary tax rate. The basis of income assessment is on a current year basis. Malaysia has a self-assessment system of taxation.

There is no capital gains tax regime in Malaysia. However, there is real property gains tax (RPGT) which is a variation of capital gains tax imposed on gains arising from the disposal of real property (i.e. land and buildings) and shares in real property companies. With effect from 1 January 2010, where the disposal of real property (i.e. land and buildings) and shares in real property companies are made within five years from the date of acquisition of the property or shares, RPGT will be imposed at a fixed rate of 5% on any gains. Disposals made after five years will be exempt from RPGT.
1.2.1 Taxation of dividends

Malaysia has an imputation system of taxing dividends. The ability of a company to pay dividends to a shareholder depends on the availability of tax franking credits (Section 108 credit) and its distributable reserves. If the company does not have sufficient tax franking credits (amount of income tax paid by the company less the amount already used to frank payments of dividends), any dividend paid would be subject to tax at the current rate of 25%. Such tax paid is not creditable against any future tax liability of the company.

Malaysia has however, introduced the single-tier tax system with effect from 1 January 2008 to replace the above imputation system. Companies which do not have credit balances in their Section 108 account as at 31 December 2007 will pay dividends under the single-tier tax system.

Companies which have unutilised Section 108 tax credits as at 31 December 2007 are given a six-year transitional period (from 1 January 2008 to 31 December 2013) to utilise the Section 108 credits for the payment of franked dividends. These companies will pay dividends under the single-tier tax system once their Section 108 account is depleted or latest by 31 December 2013 even though they have not yet fully utilised their Section 108 tax credits.

Under the imputation system, Malaysian-sourced dividends received by shareholders are deemed to have suffered tax at the corporate tax rate (currently 25%) by the paying company. If there are expenses incurred in deriving such dividends, these expenses are tax deductible and may result in the shareholders receiving a tax refund upon filing their tax return.

With the introduction of the single-tier tax system, dividends payable to shareholders under the single-tier tax system are exempt from Malaysian income tax in the hands of shareholders.

Exempt income, generated from offshore income or tax incentives (such as pioneer income) may be distributed to the shareholders without having to satisfy the franking requirement mentioned above. Notwithstanding the introduction of the single-tier tax system, exempt dividends will continue to be paid out as exempt dividends. Such dividends, paid out of tax-exempt profits, are not subject to tax in the hands of the shareholders.

There is no withholding tax on dividends paid by Malaysian companies.

1.3 Withholding tax

The Malaysian income tax legislation provides for withholding tax to be deducted at source on certain payments made to non-residents. The withholding tax rates are as follows:

<table>
<thead>
<tr>
<th>Type of income</th>
<th>Non-treaty rate</th>
<th>Treaty rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest</td>
<td>0 - 15%</td>
<td>0 - 15%</td>
</tr>
<tr>
<td>Royalties</td>
<td>10%</td>
<td>0 - 10%</td>
</tr>
<tr>
<td>Management / technical fees</td>
<td>10%</td>
<td>0 - 10%</td>
</tr>
<tr>
<td>Rental of movable property</td>
<td>10%</td>
<td>0 - 10%</td>
</tr>
<tr>
<td>Other gains or profits</td>
<td>10%</td>
<td>10%</td>
</tr>
</tbody>
</table>

1 Effective from 21 September 2002, payments to non-residents in respect of management / technical services rendered outside Malaysia will not be subject to withholding tax.

2 Effective 1 January 2009, the scope of withholding tax on non-residents has been expanded to include income from gains or profits not included under gains from a business, dividends, interests, rents or royalties. The types of income under this category include commissions, guarantee fees, introducer’s fees, etc. which do not represent business gains of the non-residents.
Malaysia has a comprehensive network of double tax treaties which may reduce the withholding tax rates on the above payments made to a resident of a treaty country.

Malaysia also imposes withholding tax on payments made to non-resident contractors in respect of services rendered in Malaysia at the following rates:

- 10% of contract payment on account of tax which is, or may be, payable by the non-resident contractor, and
- 3% of contract payment on account of tax which is, or may be, payable by employees of the non-resident contractor.

It is generally the view of the Malaysian tax authorities that reimbursement or disbursement of out-of-pocket expenses to non-residents in respect of services rendered by the non-residents in Malaysia (other than reimbursements or disbursements on hotel accommodation in Malaysia), or the rental of movable properties from non-residents, will be considered as part of the contract value and should be subject to withholding tax.

1.4 Goods and services tax / Value added tax

Currently, Malaysia does not have a value added tax (VAT) system. However, the government has proposed to implement a consumption tax system based on the value-added model to be known as goods and services tax (GST). GST is proposed to replace the existing consumption taxes (i.e. sales tax and service tax). The implementation date for the GST has yet to be announced.

Based on the discussion paper issued by the government, it is proposed that the transfer of a going concern is disregarded for GST / VAT purposes on the basis that it is neither a supply of goods nor services.

 Currently, the following indirect taxes may be imposed on goods and services, as the case may be:

- import duties at specific rates, ad valorem rates (up to 60%) or composite rates, on dutiable goods imported into Malaysia
- sales tax at specific rates or ad valorem rates (nil, 5% and 10%) on taxable goods that are manufactured in, or imported into, Malaysia
- excise duties at specific rates, ad valorem rates (up to 105%) or composite rates, on goods subject to excise duty that are manufactured in, or imported into, Malaysia, and
- with effect from 1 January 2011, service tax is increased to 6% (from 5% previously) on taxable services provided by taxable persons, which are prescribed by way of regulations.

1.5 Stamp duty

Malaysia imposes stamp duty on chargeable instruments executed in certain transactions. In a stock deal, Malaysian stamp duty is payable at the rate of 0.3% on the consideration paid or market value of the shares, whichever is higher. In an asset deal, stamp duty ranging from 1% to 3% is payable on the market value of the dutiable property transferred under the instrument. Stamp duty is payable by the buyer.

Specific relief from stamp duty is available provided stipulated conditions are met (see section 2.4.3).

1.6 Capital gains tax

There is no general capital gains tax regime in Malaysia.

RPGT is a variation of capital gains tax. Under the RPGT Act 1976, RPGT is charged on gains arising from the disposal of real property (i.e. land and buildings) situated in Malaysia or shares in real property company (RPC) a controlled company, the major assets of which consist substantially of real properties or RPC shares. Depending on the period of ownership, these gains will be subject to RPGT at rates ranging from 5% to 30%.

With effect from 1 January 2010, where the disposal of real property and shares in RPC are made within five years from the date of acquisitions of the real property / shares in RPC, RPGT will be imposed at a fixed rate of 5% on any gain. Disposals made after five years will be exempt from RPGT.

Specific exemptions from RPGT are available, provided stipulated conditions are met (see section 7.3.1). Approval for exemption must be secured prior to the disposal.

1.7 Common forms of business

The following are the common forms of business entities in Malaysia:

- **Limited liability company**

  A limited liability company is regulated by the Companies Act, 1965. A limited liability company is a tax resident in Malaysia for the basis year for a year of assessment if control and management of its business or affairs are exercised in Malaysia at any time during that basis year. A limited liability company is required to have a registered office and at least two resident directors in Malaysia.
2. Acquisitions

2.1 The preference of purchasers: stock vs. asset deal

The benefits and drawbacks of either a stock or asset acquisition depends on various factors, including the tax attributes of the target company, the acquiring company, business fit of the target company with the buyer, and most importantly, the commercial considerations. Potential buyers can also improve shareholder values and returns on investment through tax efficient structuring and planning.

In a stock acquisition, the buyer may be exposed to liabilities in the target company. As such, the buyer would need to carry out a due diligence exercise on the target company’s business in a stock acquisition compared to an asset acquisition.

2.2 Stock acquisition

The main advantage of a stock acquisition is that the tax attributes such as accumulated tax losses, unutilised tax depreciation, tax incentives or dividend franking credits (where the credits are still available for dividend franking until 31 December 2013) remain with the target company.

• Preservation of accumulated tax losses and unutilised tax depreciation carried forward

Generally, companies are allowed to carry forward their accumulated tax losses and unutilised tax depreciation to be set off against their future business income. Such tax treatment is accorded for an unlimited period of time. With effect from the year of assessment 2006, accumulated tax losses and unutilised tax depreciation of a target company which is dormant shall be disregarded in the event when there is a change of more than 50% of the shareholding in the target company.
Continuity of tax incentives
Where the target company is entitled to any tax incentives or exemptions, the conditions attached to the incentives or exemptions should be examined to ensure that a change in ownership will not affect the target’s entitlement to such incentives or exemptions.

Others
As highlighted above, the buyer may be exposed to liabilities in the target company in a stock acquisition. Hence, a thorough due diligence exercise on the target company’s business in a stock acquisition will need to be conducted. This step will help identify the potential tax costs and, where appropriate, explore means of minimising the impact or applying for exemption. The due diligence could also contribute towards managing potential risks in the future.

2.3 Asset acquisition
In an asset acquisition, any tax attributes such as accumulated tax losses, unutilised tax depreciation, tax incentives and dividend franking credits (available for dividend franking until 31 December 2013) remain with the target company and may not be transferred to the buyer.

Preservation of accumulated tax losses and unutilised tax depreciation carried forward
Generally, accumulated tax losses and unutilised tax depreciation of a target company may not be transferred to the acquiring company in an asset acquisition.

Continuity of tax incentives
Under an asset deal, any tax incentives or tax exemptions currently enjoyed by the target company is not likely to be able to be transferred to the acquiring company. Generally, the buyer will have to submit a new application for tax incentives or tax exemptions upon acquiring the business, if it is eligible.

Others
In an asset acquisition, the buyer has the choice of determining the assets and / or liabilities to be acquired. However, the buyer should still carry out a limited due diligence exercise on the assets to be acquired.

2.4 Transaction costs
2.4.1 Goods and services tax / Value added tax
As mentioned in section 1.4, Malaysia does not currently have a GST / VAT system, however one is likely to be implemented in the foreseeable future. However, based on the discussion paper issued by the government, it is proposed that the transfer of a going concern be disregarded for GST / VAT purposes on the basis that it is neither a supply of goods nor services.

2.4.2 Stamp duty
In a stock deal, Malaysian stamp duty is payable by the buyer at the rate of 0.3% on the consideration paid or market value of the shares, whichever is higher. For an asset deal, stamp duty ranging from 1% to 3% is payable by the buyer on the market value of the dutiable properties transferred under the instrument. With effect from 1 January 2008, private valuation reports on properties instead of valuation from the government can be accepted provided that a bank guarantee payable to the stamp collector for the additional duty is furnished (see section 1.5).

Service agreements attract ad valorem stamp duty at the rate of 0.5%. With effect from 1 January 2011, the stamp duty was reduced to 0.1% pursuant to a stamp duty remission order.

Specific stamp duty relief is available provided stipulated conditions are met (see section 2.4.3).

2.4.3 Concessions relating to mergers and acquisitions
The Malaysian Income Tax Act and Stamp Act provide some concessions when a company is being reorganised.

For income tax purposes, the sale of tax depreciable assets between related parties may be effected at the tax written down value of the assets. This means that the seller will not have any taxable balancing charge or deductible balancing allowance arising from the sale. The buyer will also be deemed to have acquired the assets at their tax written down value. The transfer value of the fixed assets will be disregarded and the buyer would be entitled to claim annual allowances based on the original acquisition cost of the fixed assets but restricted to the tax written down value of the assets acquired. No initial allowance may be claimed on these fixed assets.
Additionally, the costs incurred in acquiring a foreign company will also be allowed a tax deduction over a five year period provided the stipulated conditions are met. For instance, the acquisition is for the purpose of acquiring high technology for production within Malaysia or for acquiring new export markets for local products. The acquirer must be a company incorporated in Malaysia with at least 60% Malaysian equity ownership and is involved in a manufacturing, or trading / marketing activities. The acquired entity must be a foreign company with 100% foreign equity ownership that is located abroad and involved in manufacturing or trading / marketing activities.

- In respect of corporate restructuring or amalgamations, relief from stamp duty is available. Some of the pertinent conditions are:
  - if the acquisition of shares or assets is in connection with a scheme of amalgamation or reconstruction and the consideration comprises substantially of shares in the transferee company, or
  - if the shares or assets are transferred between associated companies (i.e. there must be 90% direct or indirect shareholding relationship between the transferee and the transferor).

### 2.4.4 Tax deductibility of transaction costs

Generally, transaction costs incurred during M&A transactions are not tax deductible to the buyer. However to the extent to which the expenses are incurred in relation to the purchase of trading stock, such expenses should be deductible.

### 3. Basis of taxation following stock / asset acquisition

#### 3.1 Stock acquisition

Acquisitions that result in a parent-subsidiary relationship are accounted for either at cost or fair value in the parent’s separate financial statements. There are no tax implications on the acquisition or subsequent disposal of the subsidiary by the parent. There is no general capital gains tax regime in Malaysia. Real property gains tax would apply on the gains arising from the subsequent sale of the subsidiary only if the subsidiary is a real property company.

#### 3.2 Asset acquisition

The accounting treatment of an asset acquisition is dependent on whether the acquisition is considered to be a business combination or an acquisition of assets for accounting purposes based on certain tests.

a. **Business combination**

The governing standard for business combinations, Financial Reporting Standard 3 (FRS 3), focuses on the substance of a transaction. A business combination is a transaction in which the acquirer obtains control of one or more businesses. A business is defined in FRS 3 as an integrated set of activities and assets that is capable of being conducted and managed for the purpose of providing a return in form of dividends, lower cost or other economic benefits directly to the investors.
FRS 3 requires all business combinations (other than business combinations under common control) to be accounted for using the acquisition method where the acquiree’s identifiable assets (including intangible assets which were not recognised previously), liabilities and contingent liabilities are generally measured at fair value. Any difference between the consideration transferred and the fair value of the identifiable net assets acquired is recognised as goodwill.

The tax treatment of assets and liabilities acquired in a business combination is dependent on the accounting treatment and is based on general tax principles. Property, plant and machinery would generally qualify for capital allowances while some intangible assets may qualify for tax deduction under specific tax rules. No tax deduction is available for the amortisation of goodwill acquired.

b. Asset acquisition

Asset acquisitions on the other hand, are accounted for at cost in accordance with the underlying nature of the assets (e.g. property, plant and equipment, investment property, inventories, etc.). The tax treatment of assets acquired is similar to that as accounted for under a business combination.

4. Financing of acquisitions

4.1 Thin capitalisation

Thin capitalisation rules have been introduced under a new anti-avoidance provision relating to transfer pricing. However, the guidelines on thin capitalisation have not been issued and there are no specific ‘safe harbour’ rules specified in the legislation. The implementation of the thin capitalisation rules is expected to take place after December 2012.

4.2 Deductibility of interest

4.2.1 Stock deal

In a stock deal where dividends are paid under the tax imputation system, an interest expense incurred on money borrowed to finance the acquisition of shares is tax deductible to the extent of the dividend income received in the same year. This could result in a tax refund to the shareholder company. However, companies which do not have credit balance in their Section 108 account as at 31 December 2007 will pay dividends under the single-tier tax system. In this case, a tax refund would not be available to the shareholder company as the dividends received under the new single-tier tax system are exempt from tax and expenses are therefore not tax deductible.
For example, assume a Malaysian company receives a gross dividend of RM100 from its Malaysian subsidiary. In the same year, the Malaysian company incurred an interest expense of RM40 on the investment. Under the tax imputation system, as the interest expense will be tax deductible against the dividend income, there will be a tax refund to the Malaysian company.

<table>
<thead>
<tr>
<th>Type of income</th>
<th>Tax imputation (RM)</th>
<th>Single-tier dividend (RM)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividend</td>
<td>100</td>
<td>75</td>
</tr>
<tr>
<td>Interest expense</td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>Net taxable dividend income</td>
<td>60</td>
<td></td>
</tr>
<tr>
<td>Tax on net taxable dividend income at 25%</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>Tax paid (imputation system) at 25% on gross dividend</td>
<td>(25)</td>
<td></td>
</tr>
<tr>
<td>Tax to be refunded</td>
<td>(10)</td>
<td></td>
</tr>
</tbody>
</table>

Under the tax imputation system, it is important to time the payment of interest with the flow of dividends to maximise the interest deduction and therefore tax refund. It should be noted that excess interest costs are not eligible to offset against other income, nor can they be carried forward to offset against future dividend income.

Under the single-tier dividend system, dividends receivable (net of tax at source of 25%) are exempt from tax. Hence, no deduction of expenses, including interest, is allowable against the dividends.

4.2.2 Asset deal

Interest incurred on funds used to acquire a business under an asset deal should be fully tax deductible. However, once the thin capitalisation rules come into effect, excess interest costs for intercompany loans will not be tax deductible. Therefore, the level of intercompany debt used to fund the acquisition of a business should be monitored. There are also specific industries in Malaysia which are required to maintain a certain minimum level of paid-up share capital.

5. Mergers

In Malaysia, there is no statutory concept of a ‘merger’. The mode of merger in Malaysia involves either an acquisition of shares in an existing Malaysian company or an acquisition of assets (and liabilities) of another entity.

Prior to 30 June 2009, all proposed acquisitions of assets (including a subscription of shares), or any interests, mergers and takeovers of a Malaysian business or company required approval of the Foreign Investment Committee (FIC), which is responsible for the coordination and regulations of such matters under the guideline on the acquisition of interests, mergers and takeovers by local and foreign interests. From 30 June 2009, the government has liberalised the FIC guidelines. The FIC guidelines covering the acquisition of equity stakes, mergers and takeovers have been repealed and as such, no equity conditions are imposed on such transactions. Notwithstanding this deregulation, the national interest in terms of strategic sectors will continue to be safeguarded through sector regulators. Companies in such sectors will continue to be subject to equity conditions as imposed by their respective sector regulator such as the Energy Commission, National Water Services Commission, Malaysian Communications and Multimedia Commission, certain sectors under the Ministry of Domestic Trade, Cooperative and Consumerism and others.
The FIC guidelines with respect to the acquisition of properties are also rationalised. FIC approval for property transactions will now only be required where:

- it involves a dilution of Bumiputra or government interests for properties valued at RM20m and above, and
- indirect acquisition of property by other than Bumiputra through acquisition of shares resulting in a change in control of the company owned by Bumiputra interest and/or government agency, having property more than 50% of its total assets and the said property is valued more than RM20m.

All other property transactions including those between foreigners and non-Bumiputras, will no longer require FIC approval.

6. Other structuring and post-deal issues

6.1 Repatriation of profits

The common methods to repatriate profits are through the payment of dividends, interest, royalties, technical fees and management fees.

The ability of a company to pay dividends to a shareholder (resident or non-resident) depends on the availability of retained earnings and dividend franking credits under the imputation tax system. With effect from 1 January 2008, companies with insufficient dividend franking credits will pay dividends under the new single-tier dividend system. Under the new single-tier system, the ability of a company to pay dividends to a shareholder (resident or non-resident) would only depend on the availability of retained earnings.

Exempt income (e.g. offshore income or pioneer income of the company) may be distributed to shareholders without having to satisfy the franking requirement.

There is no restriction for exchange control purposes on dividend distributions by a Malaysian subsidiary.

Payments of interest and royalties to non-residents are subject to withholding tax at rates which may be reduced under the relevant double tax treaty. For management and technical fees, if the services are performed wholly outside Malaysia, there is no withholding tax on the payments. Other payments not falling within the definition of business income or the above types of payments are also subject to withholding tax as mentioned in section 1.3.
6.2 Tax losses carried forward and unutilised tax depreciation carried forward

As explained in section 2.2, a company is generally allowed to carry forward its accumulated tax losses and unutilised tax depreciation to be set off against its future business income. Unutilised tax depreciation may be carried forward indefinitely, but can only be used to set off against future income of the same business source. These unutilised balances may not be applied against income of a new business source.

A dormant company however is only allowed to carry forward its accumulated tax losses and unutilised tax depreciation provided there is no change of more than 50% of its shareholding.

Unabsorbed tax losses, unutilised tax depreciation and dividend franking credits (where applicable) may not be transferred to the acquiring company under an asset deal.

6.3 Tax incentives

For a stock deal, the conditions attached to the tax incentives granted should be examined to ensure that a change in ownership will not affect the target company’s entitlement to such incentives or exemptions.

Under an asset deal, any tax incentives or exemptions currently enjoyed by the target company cannot be transferred to the acquiring company. Generally, the buyer will have to submit a new application for tax incentives or exemptions upon acquiring the business, if it is eligible.

Any unutilised tax incentives may be carried forward indefinitely, but may only be used to set off against future income of the same business source.

6.4 Group relief

Beginning from the year of assessment 2006, tax losses of a Malaysian company may be utilised to set off against the aggregate income of another company within the same group provided stipulated conditions are met.

The group relief is limited to 70% (increased from 50% to 70% effective from the year of assessment 2009) of the current year’s unabsorbed tax losses of the surrendering company. The following conditions need to be satisfied before the tax losses may be surrendered:

- both the claimant and the surrendering companies must have the same accounting period
- the shareholding, whether direct or indirect, of the claimant and surrendering companies in the group must not be less than 70%. In determining the 70% shareholding relationship, shares with fixed dividend rights are ignored
- the 70% shareholding must be on a continuous basis during the preceding year and the relevant year
- the claimant company must be able to demonstrate that it is beneficially entitled, directly or indirectly, to at least 70% of the residual profits and assets (in the case of liquidation) of the surrendering company, available for distribution to all equity holders (and vice versa), and
- the companies are not enjoying tax incentives in the year where tax losses are being surrendered or claimed.

Losses resulting from the acquisition of proprietary rights or a foreign-owned company should be disregarded for the purpose of group relief.
7. **Disposals**

### 7.1 The preference of sellers: stock vs. asset deal

In preparing for a deal, the seller should identify the income tax impact on any gains arising from the stock or asset deal. Where possible, the tax costs should be quantified and the potential tax exposure minimised. Positive tax attributes and value of tax shelters (e.g. the availability of carry forward accumulated tax losses, unutilised tax depreciation and availability of tax franking credits – which can be utilised until 2013) could also be factored in and used as a bargaining tool when negotiating with the buyer. As mentioned earlier, if the target company is a dormant company, accumulated tax losses and unutilised tax depreciation of the target company shall be disregarded in the event there is a change of more than 50% of the shareholding in the target company.

Generally, from a seller’s perspective, it may be less complicated to sell a target through a stock deal.

### 7.2 Stock sale

#### 7.2.1 Profit on sale of stock

Unless the seller is in the business of dealing in shares, the profits on the sale of shares should not be subject to income tax as such profits are considered capital in nature. Malaysia does not have a general capital gains tax regime.

#### 7.2.2 Distribution of profits

Provided the seller has sufficient retained earnings, the cash proceeds received from the sale of stock can be distributed as a dividend to the shareholders.

### 7.3 Asset sale

#### 7.3.1 Profit on sale of assets

With effect from 1 January 2010, where the disposal of real property (i.e. land and buildings) and shares in real property companies are made within five years from the date of acquisition of the property / shares, RPGT will be imposed at a fixed rate of 5% on any gains. Disposals made after the five-year period will be exempt from RPGT.

However, if the company trades in real property or develops real property, the gain on sale of real property would be subject to income tax.
There are, however, exemptions available under the RPGT Act 1976. The most notable is the exemption in relation to the transfer of real property between companies in the same group. It is possible to apply for exemption from RPGT (provided stipulated conditions can be met) on the transfer of assets between companies in the same group if the assets are transferred to bring greater efficiency in the business operations.

The exemption also may cover assets:

- transferred between group companies under any scheme of reorganisation, reconstruction or amalgamation, or
- distribution by a liquidator in the case of a liquidation made under any scheme of reorganisation, reconstruction or amalgamation.

Prior approval must be obtained from the Malaysian tax authorities for transactions in the categories mentioned above.

In respect of the sale of trading stock of a company, any gains arising from the sale are subject to income tax as it is considered part of business income. Any gain on the sale of fixed assets is not subject to income tax. For transactions between unrelated parties, a balancing adjustment (balancing charge or allowance) may arise. If the transfer value exceeds the tax written down value of the asset, the difference, known as a balancing charge, is taxable to the company. The balancing charge is restricted to the amount of allowances previously claimed. If the transfer value is less than the tax written down value of the asset, the shortfall, a balancing allowance, is deductible against the adjusted income of the company. If the transaction is between related parties, no balancing adjustment arises on the seller as the assets are deemed to be transferred at their tax written down value.

Currently, there are no indirect tax implications for the disposal of real property (e.g. factory and office premises) and for the sale of machinery / equipment and trading stocks, where import duty and / or sales tax have been paid. In addition, the disposal of shares will not be subject to any indirect taxes in the form of import duty, excise duty, sales tax or service tax.

If the seller has any exemptions from import duty and / or sales tax, including any facility for licensed manufacturers in Malaysia (licensed under the Sales Tax Act), the following indirect tax implications apply:

- in respect of sales tax-free raw materials, taxable work-in-progress and taxable finished goods manufactured by the seller, who is a licensed manufacturer under the Sales Tax Act, there are provisions in the Sales Tax Act to allow the buyer to purchase these items free of sales tax subject to certain conditions being met. However, the buyer has to be a licensed manufacturer as well. Otherwise sales tax would be due and payable upon sale by the seller.

7.3.2 Distribution of profits

As mentioned in section 7.2.2 on stock sale, the gain arising from the disposal of assets may be distributed as a dividend to the shareholders provided there are sufficient retained earnings in the company.
8. Transaction costs for sellers

8.1 Goods services tax / Value added tax

As mentioned in section 1.4, based on the discussion paper issued by the government, it is proposed that the transfer of a going concern be disregarded for GST / VAT purposes on the basis that it is neither a supply of goods or services.

8.2 Stamp duty

Stamp duty is borne by the buyer for any transfer of shares or real property.

8.3 Concessions relating to mergers and acquisitions

The Malaysian Income Tax Act provides some concessions when a company is being reorganised.

- For income tax purposes, the sale of tax depreciable assets between related parties can be effected at the tax written down value of the assets. This means that the seller will not have a balancing charge or balancing allowance arising from the sale.

- In addition to the above, to further encourage public listed companies to expand and compete globally, stamp duty exemptions are given on an approved scheme of M&A undertaken by companies listed on Bursa Malaysia. The M&A must be approved by the Securities Commission up to 31 December 2010 and executed not later than 31 December 2011.

8.4 Tax deductibility of transaction costs

Generally, transaction costs incurred on M&A transactions are not tax deductible to the seller. However, to the extent to which the costs are incurred in relation to the sale of trading stock, such costs shall be tax deductible.
9. Preparation of a target for sale

In preparing for a deal, it is appropriate for the seller to identify the income tax impact on any gains arising from the share or asset deal. Where possible, the tax costs should be quantified and the potential tax exposure minimised. Positive tax attributes and the value of tax shelters (e.g. the availability of carry forward accumulated tax losses, unutilised tax depreciation and availability of tax franking credits – available to be utilised until 31 December 2013) could also be factored in and used as a bargaining tool when negotiating with the buyer. As mentioned earlier, if the target company is a dormant company, accumulated tax losses and unutilised tax depreciation of the target company shall be disregarded in the event there is a change of more than 50% of the shareholding in the target company.

- **Intra group transfer of assets being retained**
  In preparing for a sale of assets, it is important to do an identification on the assets to be transferred, identification of costs and net book values of the assets to be transferred and to engage an independent professional appraiser to value the assets.

- **Pre-sale dividend**
  A company may decide to pay a dividend to its shareholders prior to a sale of the shares in the company. The ability of a company to pay dividends depends on the availability of retained earnings. There are no adverse tax implications arising from a distribution of pre-sale dividends.

10. Demergers

There is no statutory concept of a ‘demerger’ in Malaysia. The mode of demerger in Malaysia typically involves either a disposal of shares or assets to another party or a distribution in specie of the shares or assets to the shareholders either via a dividend distribution or a capital reduction exercise, which requires Court approval.

The tax treatment of a disposal is covered in section 7.

From 1 January 2008 onwards, where the demerger is by way of a dividend in specie of assets, the dividend paid is considered as single-tier dividend (see section 1.2). This dividend is exempt in the hands of the shareholders.

Where the demerger is effected by way of a return of capital via a capital reduction exercise, the shareholders would generally not be taxed on the capital distribution (unless the shareholders are treated as share dealers).
11. Listing / Initial public offering

On IPO, there should be no tax implications to a seller if the shares have been held as a long-term investment.

12. Tax incentives

There are a number of tax incentives granted for doing business in Malaysia. These include the followings:

- pioneer status or investment tax allowance for promoted products or activities
- tax exemption:
  - approved Regional Distribution Centre (RDC)
  - International Procurement Centre (IPC)
  - international trading company
  - Real Estate Investment Trust (REIT)
  - Property Trust Fund (PTF)
  - venture capital company
  - closed-end fund company
- Islamic fund management company
- Islamic stock broking company
- food production company
- research and development companies
- companies located in development regions such as:-
  - Multimedia Super Corridor (MSC)
  - Iskandar Development Region
  - Northern Corridor Economic Region
  - East Coast Economic Region
  - Sarawak Corridor of Renewable Energy
- reinvestment allowance
- tax allowance for increased exports, approved services projects and infrastructure
- approved operational headquarters.