

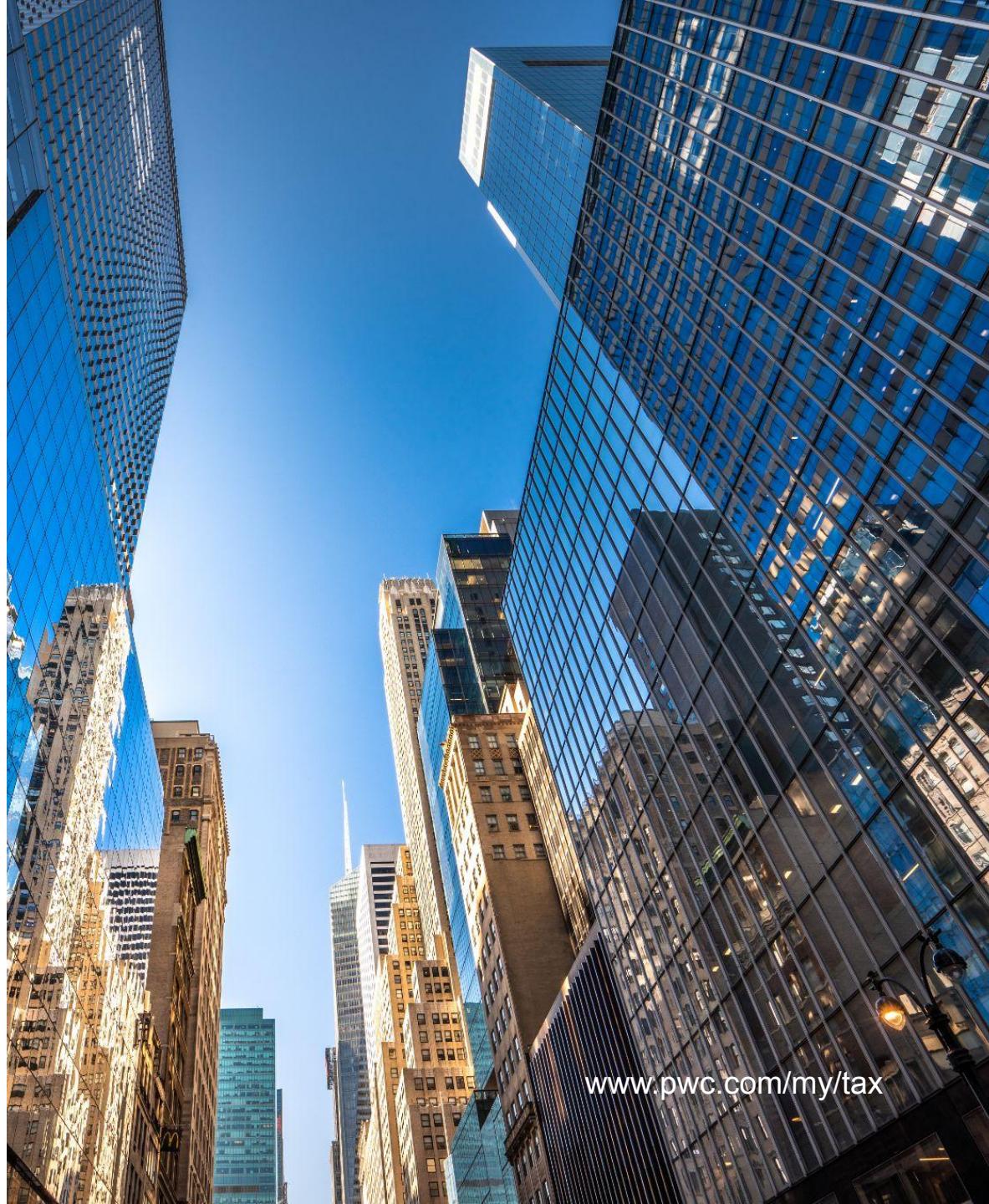


TaXavy

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Guidelines for Capital Gains Tax on Foreign Capital Assets

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Guidelines for Capital Gains Tax (CGT) on Foreign Capital Assets

The Income Tax (Exemption) (No. 3) Order 2024 (“Exemption Order”) was gazetted on 4 March 2024 to provide exemption from CGT on gains arising from disposal of foreign capital assets received into Malaysia. The exemption is subject to conditions to be imposed by the Minister under guidelines to be issued by the Inland Revenue Board (IRB).

The IRB has now issued the Guidelines on Tax Treatment on Gains From the Disposal of Foreign Capital Assets Received from Outside Malaysia dated 27 March 2024 (“Guideline”).

In addition to conditions for the exemption, the Guideline also explains the tax treatment on gains from the disposal of foreign capital assets received in Malaysia by a resident.

This issue of the TaXavvy covers:

- Overview of CGT
- Highlights from the Guideline

Overview of CGT

CGT is applicable on gains from disposal of capital assets by companies, limited liability partnerships (LLPs), co-operatives and trust bodies as follows:

	CGT rate	Effective date
	On net gain (chargeable income)	On gross disposal price (optional rate for assets acquired before 1 January 2024)
Unlisted shares ¹ Section 15C shares ²	10% or	2%
Foreign capital assets ³	Prevailing income tax rate on gains received in Malaysia (e.g. 24% for companies)	1 January 2024 ⁵

Exemptions / non-chargeability has been announced for the disposals made by the following persons:

- *Individuals*
- *Gains from disposal of shares related to⁶:*
 - *Initial public offering (IPO) exercised approved by Bursa Malaysia*
 - *Restructuring of shares within the same group*
 - *Venture capital companies*
- *Gains from disposal made by unit trusts (refer to [TaXavvy 1-2024](#))*

¹ Shares of unlisted companies incorporated in Malaysia (“unlisted shares”)

² Shares of a controlled company incorporated outside Malaysia deriving value from real property in Malaysia under section 15C of the Income Tax Act 1967 (ITA 1967) (“section 15C shares”)

³ Gains from disposal of capital assets situated outside Malaysia on or after 1 January 2024 and remitted into Malaysia (“foreign capital assets”)

⁴ Effective from 1 January 2024, and exempted from 1 January 2024 to 29 February 2024 under the Income Tax (Exemption) (No. 7) Order 2023 and the Income Tax (Exemption) (No. 2) Order 2024, respectively

⁵ Finance (No. 2) Act 2023

⁶ Budget 2024 announcement

Highlights from the Guideline

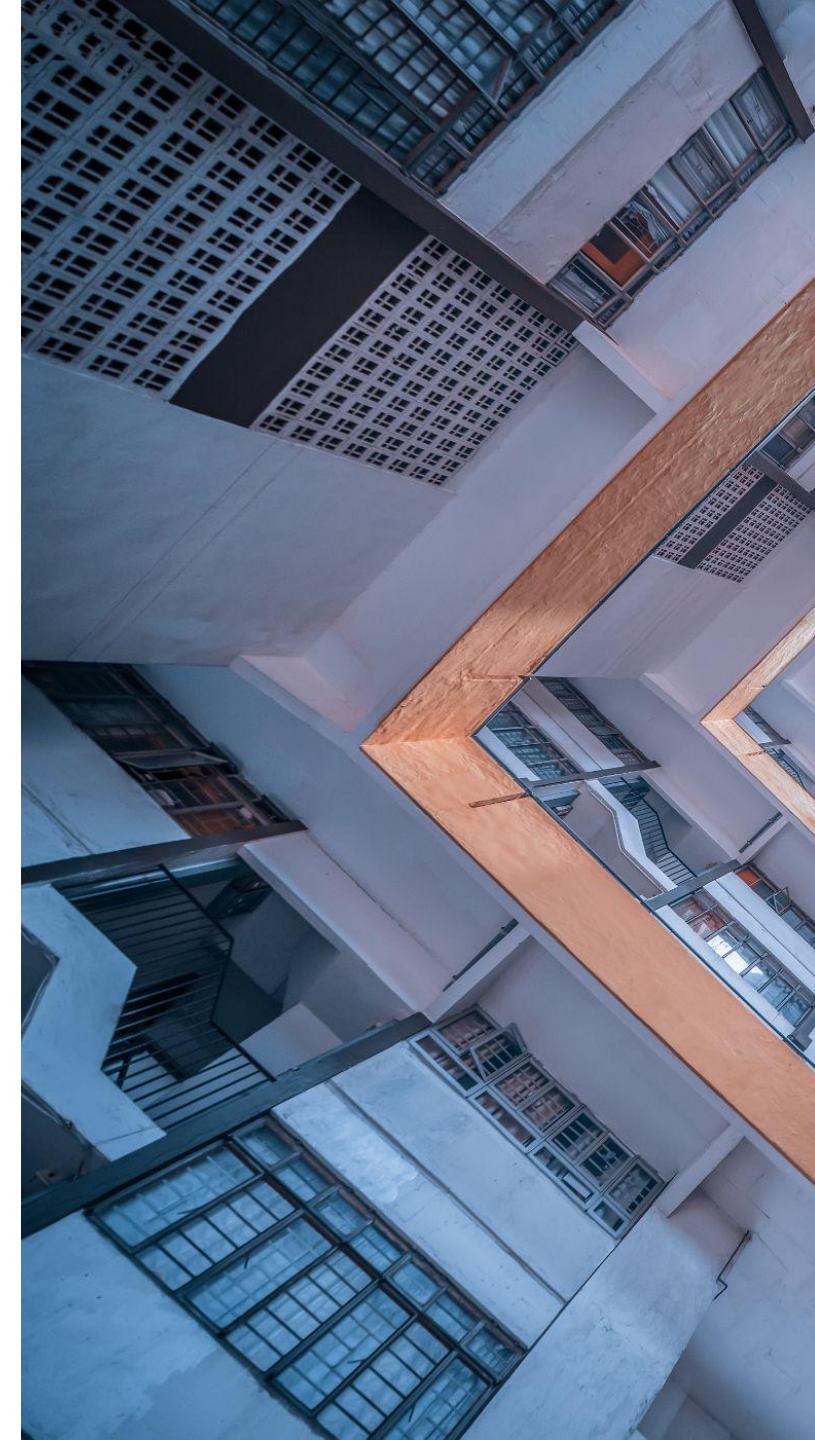
The Guideline covers tax treatment on gains from disposal of foreign capital assets remitted into Malaysia. Highlights are:

- **Tax return:** Foreign capital gains are to be declared in the annual income tax return form (ITRF) of the respective chargeable person. For companies, this will be the Form e-C. Therefore, unlike capital gains from disposal of unlisted shares of companies incorporated in Malaysia, the IRB does not require a CGT return (e-CKM Form) to be filed within 60 days from the date of each disposal.
- **Economic substance requirements (ESR):** Under the Exemption Order, the ESR conditions for the CGT exemption are to be specified in the IRB's Guideline. Key conditions are:
 - employ adequate number of employees with necessary qualifications to carry out the specified economic activities in Malaysia; and
 - incur adequate amount of operating expenditure for carrying out the specified economic activities in Malaysia.

Similar to the existing Guidelines on Tax Treatment of Income Received from Abroad dated 29 December 2022, the IRB does not prescribe adequacy thresholds. Instead, factors which will be considered for each taxpayer are:

- Number of employees, considering the capital / labour intensity requirements of the business
- Whether the employee works full-time or part-time
- Whether office premises have been used / sufficient for the activity

Comment: *The ESR are consistent with the existing Guidelines on Tax Treatment of Income Received from Abroad dated 29 December 2022. The absence of prescribed thresholds ensures a one-size-fits-all approach is not adopted in order for each business to make its own case. At the same time, certainty and predictability is crucial for businesses. Businesses which require certainty especially in a self-assessment environment should consider approaching the IRB for a confirmation on its compliance of the ESR conditions prior to filing its tax return.*



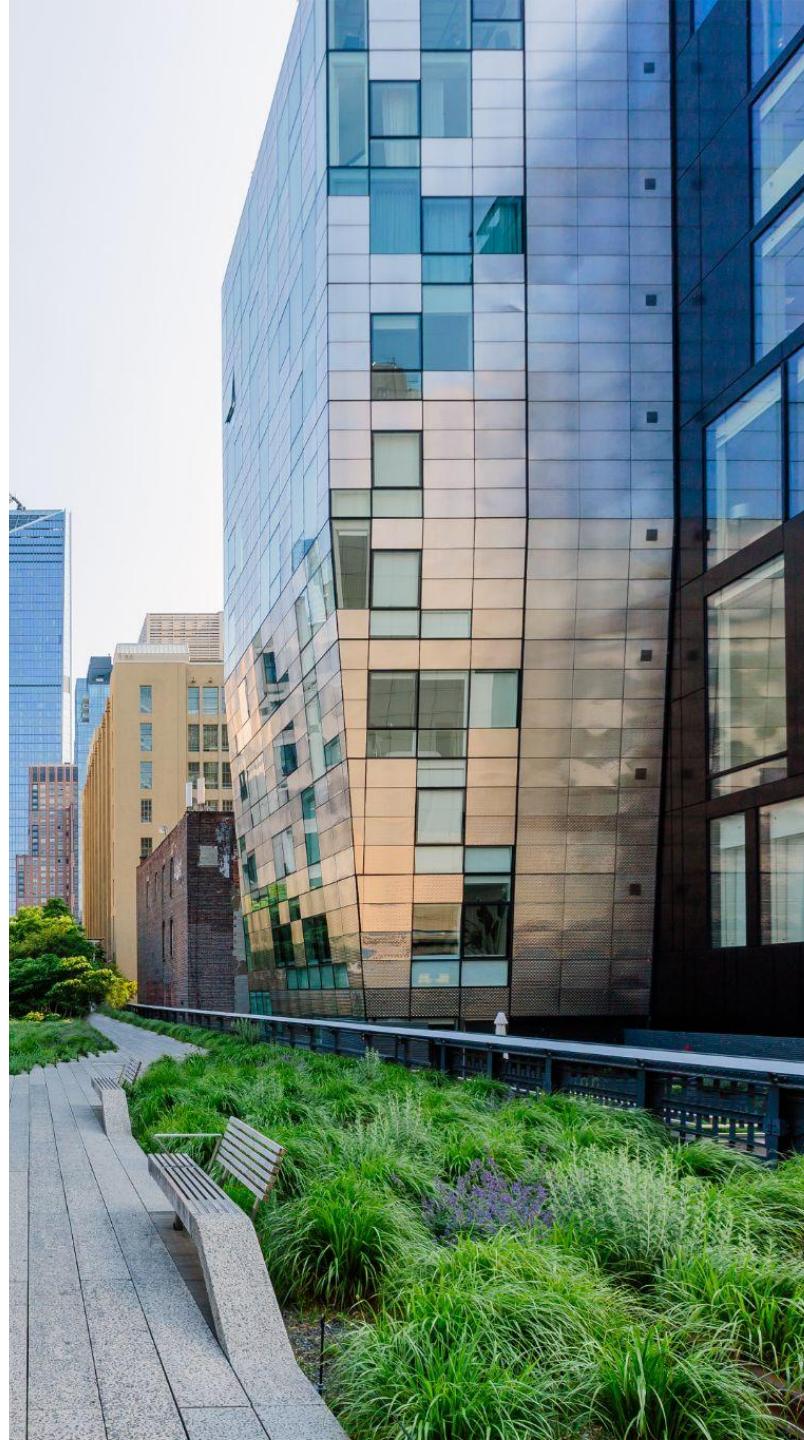
Highlights from the Guideline (cont'd)

- **Example of ESR for manufacturing business:** In Example 5 of the Guideline, a chip manufacturing technology company with a factory in Malaysia which employs 150 people and incurs operating expenditure of RM1 million is considered to have adequate ESR.
- **Outsourcing:** Specified economic activities of a taxpayer which are outsourced will be taken into account for ESR adequacy purposes. Key conditions to observe include:
 - Activities are to be carried out in Malaysia
 - The taxpayer implements sufficient monitoring and control
 - The outsourcing entity is generally expected to charge an arm's length price for performance of the functions
 - The number of employee and operating expenses incurred by the outsourcing entity is equivalent to the level of specified economic activity and there is no double counting if the outsourcing entity provides services to more than one person.

The IRB provides one outsourcing example where a resident investment holding company, which does not employ any employee, could meet the ESR adequacy tests when it outsources its investment and asset management activities. Gains from disposal of a foreign property received in Malaysia is exempt from CGT as that company is considered to have fulfilled the ESR. Refer to Example 6 of the Guideline for details.

- **Service director is considered an employee:** For ESR adequacy purposes, a service director who is employed based on contract of service is counted as an employee. Conversely, a non-service director is not considered as an employee.
- **Disposals prior to 1 January 2024:** Amounts received in Malaysia in respect of disposals which were made prior to 1 January 2024 are not taxable.

Comment: *This is a welcomed technical clarification and is a treatment that is comparable with the positions adopted by other jurisdictions (e.g. Singapore) which have revised its foreign-sourced income regime based on the EU Code of Conduct (Business Taxation) revised guidance.*



Highlights from the Guideline (cont'd)

- **Meaning of “received in Malaysia”:** Means “transferred or brought into Malaysia whether in the form of cash or through electronic funds transfer; or both”.

Comment: This is consistent with the meaning adopted by the IRB in its existing Guidelines on Tax Treatment of Income Received From Abroad dated 29 December 2022.

- **Foreign tax credit (FTC):** The IRB has affirmed the availability of FTC (both bilateral and unilateral credit) against Malaysian tax where the gains received in Malaysia has suffered foreign tax.
- **Examples of foreign capital assets:** This includes immovable property (e.g. buildings and land) and movable property (e.g. paintings) physically situated outside Malaysia, intellectual property, shares of companies incorporated outside Malaysia, etc.

Some outstanding matters include:

- **Treatment of losses from disposal of foreign capital assets:** The tax treatment of losses including interaction with capital gains arising from unlisted shares and section 15C shares is not covered.
- **Details on other CGT exemptions:** The relevant subsidiary legislation and / or guidelines in relation to exemptions announced for unit trusts, approved IPOs, transfer of shares in relation to group restructurings, and venture capital companies are pending.

The Guideline is available on the IRB's website www.hasil.gov.my (Home > Legislation > Guidelines > Technical Guidelines).



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