

## Client Alert

6 May 2020

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## Wealth Management and Tax Planning in the Wake of COVID-19

Prompted by the rapid increase of the novel coronavirus (“**COVID-19**”) cases in the country, Malaysia has implemented the nationwide Movement Control Order (“**MCO**”) effective from 18 March 2020, and further extended thrice to 12 May 2020 as part of a continued effort to curb the spread of the COVID-19 outbreak. During the containment period, all non-essential businesses and services are required to cease operations, except for those who have obtained approval from the Ministry of International Trade and Industry to operate and where some relaxation has been permitted commencing 4 May 2020. Similar to the efforts undertaken by foreign governments, the MCO also imposes travel restrictions on the movements into, out of and within the country. In this client alert, we will explore the potential opportunities and issues that the MCO poses for private individuals considering their wealth, succession and tax planning.

### Opportunities for Wealth and Tax Planning

Given that the imposition of the MCO is unprecedented in Malaysia and the degree and duration of the crisis remains uncertain, it is timely for individuals to start thinking about how the situation has affected their lives and to plan for future wealth transfers. For those who have been too preoccupied to focus on wealth planning strategies, this period appears to be an opportunity for them to take the time and start structuring their wealth given the inability to travel, and the slowdown of the pace of businesses.

For those who have had the foresight to put in place plans to ensure the smooth transition of wealth, it is also important to re-examine such plans as what was formerly considered efficient wealth planning may no longer be tax efficient in this time of crisis. For example, as a result of the stimulus packages rolled out by the Malaysian government to aid the repercussions of the COVID-19 outbreak, the Malaysian government may be pressured into taking proactive tax measures, such as the reintroduction of inheritance tax. As such, prior structures should be reviewed to ensure that such structures continue to remain robust and tax efficient.

### Issues with Attesting and Executing Wills

The COVID-19 has posed novel challenges for those who are isolated (either self-quarantine or in a hospital), and those who are elderly and more vulnerable to COVID-19, to effectively comply with the legal formalities of making a Will. Under the Malaysian Wills Act 1959 (“**Wills Act**”), in order for a Will to be legally valid, the following requirements must be fulfilled:

- (a) the testator (the person making the Will) must be of or above the majority age of 18 and of sound mind;





- (b) the Will must be made in **writing** and **signed by the testator** or by some other person in his presence and by his direction; and
- (c) at least **two (2) witnesses must be present** at the time of signing of the Will and they cannot be the beneficiaries or the spouse of the beneficiary of the Will.

During the MCO, Wills can still be prepared. In order to give effect to the social distancing policy, meetings to discuss Wills and taking of instructions can be facilitated via technological means, such as calls, video conferencing and emails.

Where the mental capacity of a testator surrounding the Will is in issue, medical practitioners may wish to consider whether it is suitable for assessments to be carried out via video conferencing and whether such method of assessments can be medically conclusive of the testator's state of mind. If so, we advise for such videos to be recorded and kept as evidence for future purposes, in case of potential disputes.

Under the MCO, there may be difficulties in obtaining witnesses to witness the signing of the Will. This is given that parties are encouraged to maintain as much social distance as possible. For testators who are receiving medical care in a hospital and are required to be isolated, it may still be possible for the execution of Wills to be witnessed by medical professionals from an adjacent room or through a window, provided the witnesses have a clear line of sight and can attest to this. Witnessing via video-conferencing, however, has yet to be formally acknowledged as an appropriate method of witnessing and thus should not be adopted if possible.

However, it is mandatory for a Will to be signed in writing, and unlike other legal documents, Wills cannot be electronically signed. The Wills Act is archaic and has not yet been amended to cater for technological advances. Since it is mandatory for a Will to be made and signed in writing, a Will that is made electronically (i.e., by video recording) is not likely to be valid and thus, of no effect.

Accordingly, those wanting to make a Will should ensure that appropriate measures are taken to ensure compliance with the Wills Act notwithstanding the extenuating circumstances surrounding the COVID-19 outbreak, to avoid future potential disputes.

## **Trusts and Inheritance Tax**

A private trust (i.e., a trust which is set up for private purposes and not charitable purposes) is a trust that is set up during a settlor's lifetime to ensure that assets are managed and distributed to beneficiaries in accordance with the settlor's wishes. Such trust structures are typically set up for long-term purposes with the goal of ensuring that the wealth of the settlor is managed and passed on the next generation smoothly without disputes.



There are many benefits of setting up trusts and in some jurisdictions, assets which are placed under a trust are not subject to inheritance tax (also known as estate duty) provided certain conditions are met.

In Malaysia, prior to the repeal of the Estate Duty Enactment 1941 ("**Enactment**") on 1 November 1991, an estate duty was chargeable on the estate of a deceased person exceeding certain threshold values. Under the repealed Enactment, assets passing on the death of the deceased **do not** include property under a disposition made by the deceased to a trust, **provided that** (i) such disposition was made more than seven (7) years before his death; and (ii) the possession and enjoyment of such assets was *bona fide* assumed by the beneficiary immediately upon the creation of the trust. In other words, assets which are transferred into a trust during the settlor's lifetime are not subject to estate duty, provided such trust was created under the right conditions and that the transfer had happened over a significant period in time before the settlor had passed away.

If estate duty is subsequently reintroduced in Malaysia, and depending on how the new legislation is drafted, the assets which are already transferred to a trust may still be caught by estate duty if not structured properly. Notably, if the new legislation adopts similar language to the repealed Enactment, the setting up of the trusts should be further expedited so that, hopefully, the settlor survives for a significant amount of time (i.e., at least seven (7) years) after making the transfer to the trust, so that the trust assets are not deemed to be subject to estate duty.

As there is no guidance or formal indication of a potential reintroduction of estate duty in Malaysia, it would be timely for individuals who have been considering trusts as a strategy for wealth and succession planning to take steps in moving their estate planning forward, including seeking further legal advice.

## **Tax Residency Issues**

### **Individuals**

The MCO may also present a challenge for Malaysian citizens and non-Malaysian citizens who have their residency in Malaysia (for example, under the Malaysian My Second Home Programme), to fulfil the tax residency test for Malaysian income tax purposes. This is because whilst the MCO and many international travel restrictions remain in place or tighten, many individuals are subject to quarantine measures and may not be able to return to Malaysia in a timely manner.

Under the Malaysian Income Tax Act ("**ITA**"), a person is considered tax resident if he or she fulfils certain conditions, including (amongst others) being in Malaysia for a period or periods amounting to at least 182 days in a year of assessment ("**Tax Residency Test**"). The tax rate of a Malaysian tax resident is 0% - 30% based on the chargeable income of such individual, and for a non-Malaysian tax resident, it is a flat rate of 30% on the chargeable income of such individual.



The above would mean that there may be difficulties for individuals to satisfy the Tax Residency Test and therefore, there is a risk that such individuals may be regarded as non-Malaysian tax residents for purposes of the ITA. Depending on the individual's circumstances, there is also a risk that such individuals may be considered tax residents of another jurisdiction if the requirements under such foreign tax laws are met.

Some tax authorities have considered the issue above and had issued formal guidance given the novelty of the COVID-19 situation. In United Kingdom, Her Majesty's Revenue and Customs ("**HMRC**") had reportedly clarified that days spent in the UK may be disregarded due to exceptional circumstances. According to the HMRC, quarantines and travel restrictions as a result of the COVID-19 pandemic may constitute exceptional circumstances, depending on the facts and circumstances of the case. If exceptional circumstances are established, the number of days a person spent in UK due to the exceptional circumstances can be disregarded for up to 60 days per tax year.

However, to date, the Malaysian Inland Revenue Board ("**IRB**") has not made similar announcements in Malaysia regarding any policy on the determination of Malaysian tax residency for individuals in view of the COVID-19 situation.

### **Companies**

The residence of a company for a particular year of assessment is generally in the country where the management and control of its business is exercised. Under the ITA, Malaysian tax residence is established where the management and control of its affairs are exercised in Malaysia by its directors. Typically, the IRB will accept that the tax residency test has been satisfied where the company conducts its board meetings in Malaysia. It is noteworthy that the IRB will not issue a certificate of residency if board meetings are held virtually and not physically in Malaysia.

Consequently, if the foreign directors of a Malaysian company are not able to travel to Malaysia to hold the board meetings due to the international travel restrictions, there is a concern whether such company is able to maintain its Malaysian tax residency status due to lack of board meetings in Malaysia.

To alleviate the situation, companies may consider appointing one or more local directors to ensure board meetings can still be conducted in Malaysia. Alternatively, companies may opt to take a pause on holding board meetings until the travel restrictions are lifted and until the foreign directors can travel to Malaysia to hold board meetings. The IRB has yet to release any announcements regarding its policy as to whether Malaysian tax residency will be affected if board meetings cannot be held in Malaysia due to COVID-19.

Consequently, there is also a risk that a Malaysian company may be treated as tax resident in a foreign jurisdiction if the directors attend a board meeting from that other jurisdiction, due to travel restrictions under the MCO and under international travel bans. As an example, in Australia, there have been concerns



that if directors of a foreign company have to attend board meetings from Australia, this will result in the company being treated as an Australian tax resident. The Australian Taxation Office has indicated that this may not be an issue if the only reason for directors attending board meetings in Australia is due to the COVID-19 situation, and there are no other changes to the circumstances of the company.

### **Conclusion**

It is important for individuals to understand how COVID-19 affects their tax position locally and internationally. Further, the COVID-19 pandemic presents an opportunity for individuals to consider and/or review their wealth planning strategies and how such strategies will impact their tax position. Individuals are advised to review their situation closely with advisors, especially if they have local and international assets, since the guidance on tax rules by each jurisdiction is evolving given the COVID-19 pandemic.

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