

<b>Jurisdiction's name:</b>	<b>Malaysia</b>
<b>Information on residency for tax purposes</b>	
<b>Section I – Criteria for Individuals to be considered a tax resident</b>	
<p>Resident Individuals is defined as an individual resident in Malaysia for the basis year for a Year of Assessment (YA) as determined under Section 7 and subsection 7(1B) of the Act. Non-resident Individual means an individual other than a resident individual. The resident status of an individual will determine whether such individual is liable to Malaysian income tax. The table below will illustrate the basic distinction between a resident and non-resident individual.</p> <p><u>Determination of Residence Status</u></p> <p>Generally, residence status for tax purposes is determined based on the number of physical presence (182 days or more) of that individual in Malaysia in a basis period for a year of assessment and not by his nationality or citizenship.</p> <p>If an individual resides in Malaysia permanently, the question of determining his residence status would not arise. However, citizens of Malaysia are not automatically tax residents. The rules governing the determination of residence status will still apply.</p> <p>An individual is considered to be physically present in Malaysia for a whole day although he is present in Malaysia for part(s) of a day.</p> <p><u>Circumstances Determining Residence Status</u></p> <p>Section 7 of the Act sets down 4 circumstances of which an individual can qualify as a tax resident in Malaysia for the basis year for a year of assessment:</p> <ol style="list-style-type: none"> <li>1) The individual is in Malaysia for 182 days or more in a basis year.</li> <li>2) The individual is in Malaysia for less than 182 days in a basis year.</li> <li>3) The individual is in Malaysia for 90 days or more in a basis year.</li> <li>4) The individual is not in Malaysia or in Malaysia for a period of less than 90 days in the basis year.</li> </ol> <p><u>Dual Residence Status And Agreements For The Avoidance Of Double Taxation</u></p> <p>Malaysia has entered into agreements with a number of countries that avoid double taxation by allocating taxing rights over bilateral income flows between the respective treaty partners.</p> <p>An individual who is a resident in one of the countries for a basis year may also be a resident of that other country for purposes of a double tax agreement. Where an individual is a resident of both countries, the avoidance of double tax agreements (DTA) generally contain certain tie breaker tests to establish residence solely in one of the countries for purposes of the agreement.</p> <p>Article dealing with residence in Malaysia's DTA states the test for residence and the tie breaker for dual residence. The tie breaker test provides that a dual resident be treated solely as a resident of the treaty partner country for purposes of the agreement. The terms of the relevant DTA should be referred to when determining tax liability. However, Malaysian resident status is still applicable for purposes of the general application of the domestic law, so that the individual's income remains assessable to Malaysian tax.</p> <p><u>Relevant tax provisions:</u></p> <ol style="list-style-type: none"> <li>1) Section 7 of the Income Tax Act 1967 (ITA 1967)</li> <li>2) Subsection 7(1B) of the Income Tax Act 1967 (ITA 1967)</li> <li>3) Residence Status of Individuals, Public Ruling No. 6/2011</li> </ol>	

## **Section II – Criteria for Entities to be considered a tax resident**

In Malaysia, entities may refer to the following:

- 1) “Body of persons” means an unincorporated body of persons (not being a company), including a co-operative society, a club, an association, a trust and a Hindu Joint Family but excluding a partnership.
- 2) “Non-resident” means other than a resident in Malaysia by virtue of section 8 and subsection 61(3) of the ITA 1967.
- 3) “Hindu Joint Family” means what in any system of law prevailing in India is known as a Hindu Joint Family or coparcenary.
- 4) “Person” includes a company, a body of persons and a corporation sole.
- 5) “Resident” means resident in Malaysia by virtue of section 8 and subsection 61(3) of the ITA 1967.
- 6) “Company” means a body corporate and includes any body of persons established with a separate legal entity by or under the laws of a territory outside Malaysia. Residence status is a question of fact and it is one of the main criteria that determines the tax treatment and tax consequences of a company or body of persons. A resident and a non-resident company in Malaysia is taxed in the same manner in respect of any gains or profits accrued in or derived from Malaysia.

### Determination Of Residence Status Of Companies Or Bodies Of Persons

Companies and bodies of persons must meet certain criteria to be considered a resident in Malaysia. Section 8 of the ITA 1967 provides for the determination of residence status in respect of companies and bodies of persons (except trust bodies) whereas subsection 61(3) of the ITA 1967 provides for the determination of residence status of a trust body.

#### 1. Residence status of a Hindu Joint Family

Pursuant to paragraph 8(1)(a) of the ITA 1967, a Hindu Joint Family is resident in Malaysia for the basis year for a year of assessment if the manager or karta is resident for that basis year. As such, if the manager or karta is a non-resident, the Hindu Joint Family is deemed a non-resident in Malaysia.

#### 2. Companies or bodies of persons carrying on a business

Pursuant to paragraph 8(1)(b) of the ITA 1967, a company or a body of persons (not being a Hindu Joint Family) carrying on a trade or business is resident in Malaysia for the basis year for a year of assessment if at any time during the basis year the management and control of its business or of any one of its businesses are exercised in Malaysia.

#### 3. Any other company or body of persons

Pursuant to paragraph 8(1)(c) of the ITA 1967, any other company or body of persons (not being a Hindu Joint Family) is resident in Malaysia for the basis year for a year of assessment if at any time during the basis year the management and control of its affairs are exercised in Malaysia by its directors or other controlling authority such as a board of management / directors. As for investment holding companies, the management and control of its affairs includes the management and important decisions in respect of investments.

#### 4. Residence status of a subsidiary or a branch of a foreign company in Malaysia

Foreign corporations normally extend their business activities to Malaysia by incorporating a subsidiary in Malaysia or registering a branch in Malaysia. The residence status of subsidiaries of foreign corporations would be determined by paragraphs 8(1)(b) and 8(1)(c) of the ITA 1967. Branches of foreign corporations in Malaysia are generally treated as non-residents in Malaysia unless it can be established that the management and control of its affairs or of its businesses or of any one of its businesses is exercised in Malaysia.

### Defining Management and control

1. Management and control is the key factor used to ascertain the residence status of a company in Malaysia. The management and control refers to the controlling authority which determines the policies to be followed by the company. The management and control is considered to be exercised where the directors meet to conduct the company's business / affairs irrespective of where the company might be incorporated. The management and control of a business of a company would depend upon how the business is managed. If, at any time during the basis year for a year of assessment at least one meeting of the board of directors is held in Malaysia concerning the management and control of the company, even though all other meetings are held outside Malaysia, then the company is resident in Malaysia for that basis year.
2. The location of the trading activities or the place of physical operations may not necessarily be the place of management and control. A company engaged in trading activities in Malaysia will not be resident in Malaysia if it is found that not only the trading activities, e.g. manufacturing or producing and selling are controlled abroad but also that the meetings of the shareholders and directors, at which all its important affairs are conducted and controlled, are also held abroad.
3. The appointment of a local director or local board of directors in Malaysia does not determine the residence status of a company. If the controlling authority is exercised by the directors who are at the company's head office overseas, then the company is not a resident in Malaysia.
4. Control by the directors determines the management and control of a company. The directors exercise their powers in the management of the company's affairs by virtue of the powers conferred upon them under the Articles of Association. On the other hand, control by the shareholders is not relevant for the determination of the management and control as share-holders exercise their power over the company by virtue of their voting power at formal meetings of shareholders.
5. The residence status of a director does not determine the residence status of a company.

### Residence status of trust bodies

Pursuant to subsection 61(3) of the ITA 1967, a trust body is deemed a resident in Malaysia for the basis year for a year of assessment only if any trustee of the trust is a resident in that basis year. However, a trust body will not be regarded as a resident if:

1. the trust was created outside Malaysia by a person or persons who were not citizens;
2. the income of that trust body for that basis year is wholly derived from outside Malaysia;
3. the trust is administered for the whole of that basis year outside Malaysia; and
4. at least one-half of the number of the member trustees are not resident in Malaysia for that basis year.

### Residence Status To Continue Once Established

Pursuant to subsection 8(2) of the ITA 1967, when it has been established by the Director General of the Inland Revenue Board Malaysia that a company is resident in Malaysia for a given year of assessment, that company is considered a resident in Malaysia for each subsequent year of assessment until the contrary is proved.

### Dual Residence Status And Agreements For The Avoidance Of Double Taxation (DTA)

Malaysia has entered into agreements with a number of countries that avoid double taxation by allocating taxing rights over bilateral income flows between the respective treaty partners.

Dual residence is avoided between Malaysia and countries with which Malaysia has tax treaties. These treaties provide a tie-breaker residence article to determine a single country of residence. The provision of the tie breaker varies from treaty to treaty.

The Article on residence in the DTA states the test for residence and the tie breaker for dual residence. The tie breaker test in an agreement provides that a dual resident be treated solely as a resident of the treaty partner country for purposes of the agreement. The terms of the relevant DTA should be referred to when determining tax liability. However, Malaysian resident status is still applicable for purposes of the

general application of the domestic law, so that the income of companies and bodies of persons remain assessable to Malaysian tax.

#### Required Documentation To Determine The Residence Status Of a Company

When trading and management and control are exercised outside Malaysia but certain directors' meetings are held in Malaysia, the following documentation may assist to determine the company's residence status:

- 1) Articles and Memorandum of Association to ascertain where the company is registered and whether or not there are any provisions regarding residence in the articles;
- 2) if the articles do give a place of management and control, whether the articles are being implemented;
- 3) the company's letter head;
- 4) minutes of directors' meetings that indicates where the meetings were held and what decisions relating to management and control were taken; and
- 5) minutes of general meetings that shows where such meetings have been held and what transpired at these meetings.

#### Relevant tax provisions:

- 1) Section 8 of the Income Tax Act 1967 (ITA 1967)
- 2) Subsection 61(3) of the Income Tax Act 1967 (ITA 1967)
- 3) Residence Status of Individuals, Public Ruling No. 6/2011

### **Section III – Entity types that are as a rule not considered tax residents**

Partnerships are not considered tax residents because the tax liability is assessed on the income of the members of the partnership.

### **Section IV – Contact point for further information**

Malaysia Competent Authority:

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