

Quick Take on Acquisitions of Real Property Companies

by Lam Zhen Hao

There is no capital gains tax on the sale of shares in Malaysia, except for gains arising from the disposal of shares in a real property company ("RPC"), pursuant to the Real Property Gains Tax Act 1976¹ ("RPGT Act").

What is an RPC?

An RPC is defined as a "controlled company" in which "real property or shares of another RPC" make up not less than seventy-five per centum (75%) of "tangible assets" of the company, at any date after 21 October 1988.

Controlled company

A controlled company is a company having not more than 50 shareholders and being controlled by not more than five persons.² It is therefore unlikely for public companies to be RPCs. Additionally, there is no requirement under the RPGT Act for the company to be incorporated under the Malaysian Companies Act 2016.³

Real property/shares in RPCs

The controlled company must hold real property or shares in an RPC, and the defined value of the real property/shares in the RPC must make up at least 75% of the total tangible assets of the company, for the company to be an RPC. "Real property" is defined in the RPGT Act as any land situated in Malaysia and any interest, option or other right in or over such land.⁴

Defined value

The defined value of real property is its market value, and the defined value of the shares of an RPC is the acquisition price of those shares. If the shares in a company were acquired after the company has become an RPC, the acquisition price of the shares in the RPC will be the consideration in money's worth of the acquisition of those shares, together with incidental costs, and less any compensation received in respect of any damage or depreciation, or forfeited deposits in connection with the acquisition of the RPC shares.⁵ In some cases, the acquisition price may also be deemed to be at the market value of the shares.⁶ In the event a company becomes an RPC after it was acquired, the acquisition price of the shares in the RPC will be determined in accordance to the following formula:⁷

$$\frac{\text{Number of RPC shares acquired}}{\text{Total issued RPC shares}} \times \text{Defined Value of the real property (or RPC shares, or both) held in the RPC}$$

Tangible assets

Tangible assets of a company may include plant and machinery, trading inventory, shares in other non-RPC companies, cash, and debtors of the company.⁸ According to the Inland Revenue Board ("IRB"), the book value of the tangible asset should be taken as the value of the tangible asset.⁹

Becoming an RPC

A company becomes an RPC if it fulfils the following criteria:

- (a) The company is a controlled company; and

1 RPGT Act, para 34A(1), Schedule 2

2 See definition of "controlled companies" under s 2 and s 139 of the Income Tax Act 1967

3 Richard Thornton, "Malaysia — the RPGT Handbook" (Commerce Clearing House (Malaysia) Sdn Bhd, 2014) para 8.4.1

4 RPGT Act, s 2

5 See RPGT Act, para 4, Schedule 2

6 See RPGT Act, para 9, Schedule 2

7 RPGT Act, para 34A(3)(a), Schedule 2

8 Inland Revenue Board's RPGT Guidelines no LHDN.01/35/(S)/42/51/84 dated 18 June 2013, para 4.1

9 *Ibid*

- (b) on or after 21 October 1988, the company acquires real property or shares in an RPC, the defined value of which exceeds 75% of the total tangible assets of the company.

A company that was incorporated prior to 21 October 1988 will be deemed an RPC on 21 October 1988, if it satisfies the aforementioned criteria at 21 October 1988.

Ceasing to be an RPC

A company ceases to be an RPC when:

- (a) it ceases to be a controlled company (that is, by having more than 50 shareholders or being controlled by more than five persons). This would normally entail the conversion of the RPC from a private company into a public company; and/or
- (b) it disposes of real property and/or shares in RPCs held, causing the defined value of its real property and/or RPC shares to fall below 75% of the company's total tangible assets.

A shareholder who acquires shares after the company has ceased to be an RPC will be deemed to acquire non-RPC shares. It is important to note that shareholders who held shares while the company was an RPC will continue to hold RPC shares, notwithstanding the cessation of the company as an RPC. The disposal of shares by such shareholders would therefore remain subject to the provisions of the RPGT Act.

Computation of RPGT during disposal of RPC shares

The RPGT payable on a disposal of RPC shares shall be computed as follows:

- (Disposal price - incidental costs/permitted expenses) - (acquisition price + incidental acquisition costs - compensation/forfeited deposits received) - exemption x RPGT rate = RPGT payable;

where the disposal price and the acquisition price shall be the monetary consideration (or its equivalent) of the disposal or acquisition of the RPC shares. In some cases, the disposal price of the RPC share may also be deemed to be the market value of the RPC shares.¹⁰

Acquiring an RPC

Under the RPGT Act, both the seller and purchaser of shares in an RPC are required to file RPGT returns within 60 days from the date of disposal of the shares, failing which parties would be subject to fines or penalties imposed by the IRB.

Prospective purchasers and sellers of shares in an RPC should keep in mind the aforesaid requirements, so that obligations under the RPGT Act that are applicable to RPCs are complied with in a timely manner. **LH-AG**

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¹⁰ RPGT Act, para 9, Schedule 2