

# Tax e-Alert

20 DECEMBER 2019

## Tax Residency For Companies And Bodies Of Persons

Recently, the Inland Revenue Board (**IRB**) issued Public Ruling No 9/2019 titled “Residence Status of Companies and Bodies of Persons” (**Public Ruling**). This Public Ruling contains the IRB’s clarification, among other things, on what constitutes “management and control”, the position of dual residence status, and the documentations required to determine the residence status of a company.

Some key points of the Public Ruling are:

- **Management and control**

This refers to the controlling authority which determines the policies of a company. Management and control are the key factors in ascertaining the residence status of a company in Malaysia. This is dependent on the way that the business is managed. It is considered that the management and control are exercised when the directors meet to conduct the company’s affairs. A company would be resident here for that basis year if the board of directors holds at least one meeting in Malaysia concerning the management and control of the company at any time during the basis year for a year of assessment.

The location of incorporation, trading activities and physical operations of the company may also not be relevant for the determination of management and control. For example, a company which is engaged in trading activities will not be resident in Malaysia if the trading activities, e.g. manufacturing or producing and selling, are controlled abroad and the meetings of the shareholders and directors, at which all its important affairs are conducted and controlled, are also held abroad.

### Contact persons:



**Datuk D. P. Naban**  
Senior Partner  
Tax, SST & Customs Practice  
T: +603 6208 5858  
E: dpn@lh-ag.com



**S. Saravana Kumar**  
Partner  
Tax, SST & Customs Practice  
T: +603 6208 5813  
E: sks@lh-ag.com

**CHAMPIONING  
TAXPAYERS**

We represent taxpayers. Be it tax litigation, advisory or structuring,  
we focus on clarity, certainty and solutions.  
Make us your confidante today.

Further, the appointment and residence status of a local director or local board of directors in Malaysia do not determine the residence status of a company. It is only the control exercised by the directors that determines the management and control of a company. Hence, if the controlling authority is exercised by the directors who are at the company's head office overseas, the company will not be deemed resident in Malaysia.

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 or the Companies Act 2016. However, control by the shareholders is not relevant for the determination of the management and control as shareholders exercise their powers over the company by virtue of their voting powers at formal meetings of shareholders.

- **Residence status of a subsidiary or a branch of a foreign company in Malaysia**

The residence status of subsidiaries of foreign corporations is governed by Section 8(1)(b) and (c) of the Income Tax Act 1967 (**ITA**). 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 their affairs or businesses or any one of their foreign corporation's businesses is exercised in Malaysia.

- **Residence status of a business trust**

A business trust is resident in Malaysia for the basis year for a year of assessment if the trustee manager of that business trust is resident in Malaysia. The trustee manager is resident for the basis year for a year of assessment if:

- the trustee manager in his capacity as such carries on the business of such business trust in Malaysia; and
- the management and control of the business of such business trust is exercised in Malaysia.

**Our sub-specialisation includes:**

**INCOME TAX**

- Tax Litigation & Dispute Resolution Proceedings
- Tax Advisory & Planning
- Tax Audit & Investigation
- Transfer Pricing & Thin Capitalisation

**INTERNATIONAL TAX**

(Including Cross-border Transaction Tax & Withholding Tax)

**SALES & SERVICE TAX**

- SST Litigation
- SST Legal Advisory
- SST Audit & Investigation
- Anti-Profitsteering

**CUSTOMS DUTY, EXCISE DUTY, SAFEGUARD DUTY & ANTI-DUMPING DUTY**

**TRADE FACILITATION & INCENTIVES**

**REAL PROPERTY GAINS TAX**

**PETROLEUM INCOME TAX**

**SALES & SERVICES TAX**

**STAMP DUTY**

[www.lh-ag.com](http://www.lh-ag.com)

**Lee Hishammuddin Allen & Gledhill**

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia  
Tel: +603 6208 5888  
Fax: +603 6201 0122  
Email: [tax@lh-ag.com](mailto:tax@lh-ag.com)

- **Residence status of trust bodies**

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:

- (i) the trust was created outside Malaysia by a person or persons who were not citizens.
- (ii) the income of that trust body for that basis year is wholly derived from outside of Malaysia.
- (iii) the trust is administered for the whole of that basis year outside of Malaysia.
- (iv) at least one-half of the number of the member trustees are not resident in Malaysia for that basis year.

- **Dual residence status and double taxation avoidance agreements**

There is no issue of dual residence where a tax treaty between Malaysia and the other relevant country exists. These tax treaties provide a tie-breaker residence article (**Article**), which is normally found under Article 4 of the Double Taxation Agreement and determines a single country of residence. The Article states the test for residence and the tie breaker for dual residence.

The tie-breaker test in an agreement provides that a dual resident shall be treated solely as a resident of the treaty partner country for the purposes of the agreement. However, the terms of the relevant double taxation agreement should be referred to when determining tax liabilities. Malaysian resident status would still be applicable for the purposes of the general application of domestic law. This is to enable the income of companies and bodies of persons to remain assessable to Malaysian tax.

Our sub-specialisation includes:

|   |   |  |
|---|---|--|
| <p><b>INCOME TAX</b></p> <ul style="list-style-type: none"> <li>• Tax Litigation &amp; Dispute Resolution Proceedings</li> <li>• Tax Advisory &amp; Planning</li> <li>• Tax Audit &amp; Investigation</li> <li>• Transfer Pricing &amp; Thin Capitalisation</li> </ul> <p><b>INTERNATIONAL TAX</b><br/>(Including Cross-border Transaction Tax &amp; Withholding Tax)</p> | <p><b>SALES &amp; SERVICE TAX</b></p> <ul style="list-style-type: none"> <li>• SST Litigation</li> <li>• SST Legal Advisory</li> <li>• SST Audit &amp; Investigation</li> <li>• Anti-Profitteering</li> </ul> <p><b>CUSTOMS DUTY, EXCISE DUTY, SAFEGUARD DUTY &amp; ANTI-DUMPING DUTY</b></p> | <p><b>TRADE FACILITATION &amp; INCENTIVES</b></p> <p><b>REAL PROPERTY GAINS TAX</b></p> <p><b>PETROLEUM INCOME TAX</b></p> <p><b>SALES &amp; SERVICES TAX</b></p> <p><b>STAMP DUTY</b></p> |
|---|---|--|

[www.lh-ag.com](http://www.lh-ag.com)

## Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia  
Tel: +603 6208 5888  
Fax: +603 6201 0122  
Email: [tax@lh-ag.com](mailto:tax@lh-ag.com)

- **Required documentations to determine residence status of company**

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

- (i) Articles and Memorandum of Association, Constitution or any such other documentation as stipulated under the Companies Act 2016 which could ascertain the location where the company is registered and whether there are any provisions regarding the residence of the company in the articles;
- (ii) if the articles do provide a place of management and control, whether the articles are implemented;
- (iii) the company's letterhead;
- (iv) minutes of directors' meetings that indicate the location where the meetings were held and the decisions relating to management and control that were taken; and
- (v) minutes of general meetings that show the location where such meetings have been held and what transpired at these meetings.

**Our sub-specialisation includes:**

**INCOME TAX**

- Tax Litigation & Dispute Resolution Proceedings
- Tax Advisory & Planning
- Tax Audit & Investigation
- Transfer Pricing & Thin Capitalisation

**INTERNATIONAL TAX**

(Including Cross-border Transaction Tax & Withholding Tax)

**SALES & SERVICE TAX**

- SST Litigation
- SST Legal Advisory
- SST Audit & Investigation
- Anti-Profitteering

**CUSTOMS DUTY, EXCISE DUTY, SAFEGUARD DUTY & ANTI-DUMPING DUTY**

**TRADE FACILITATION & INCENTIVES**

**REAL PROPERTY GAINS TAX**

**PETROLEUM INCOME TAX**

**SALES & SERVICES TAX**

**STAMP DUTY**

[www.lh-ag.com](http://www.lh-ag.com)

**Lee Hishammuddin Allen & Gledhill**

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia  
Tel: +603 6208 5888  
Fax: +603 6201 0122  
Email: [tax@lh-ag.com](mailto:tax@lh-ag.com)

## Conclusion

While the Public Ruling is not legally binding, it can be referred to as a guideline as long as it does not contravene the law. According to the Public Ruling, the appointment of a local director or even a local board of directors will not serve to determine the residence status of a company if the real control is exercised outside of Malaysia.

Additionally, if a company is conducting several businesses, it is merely necessary to show that the management and control of any one of the company's businesses are exercised in Malaysia. The company may also be considered as resident for that basis year if it can be shown that at least one of the directors' meetings was held in Malaysia during the basis year. Lastly, documentations such as minutes of board meetings, which show control and management of a company, are relevant in determining the residence status of a company.

If you have any queries, please contact our Tax, SST & Customs partners, **Datuk D P Naban** or **S Saravana Kumar**, at [tax@lh-ag.com](mailto:tax@lh-ag.com)

**Published by the Tax, SST & Customs Practice,  
Lee Hishammuddin Allen & Gledhill**

### Contact persons:

#### Datuk D. P. Naban

Senior Partner  
Tax, SST & Customs Practice  
T: +603 6208 5858  
E: [dpn@lh-ag.com](mailto:dpn@lh-ag.com)

#### S. Saravana Kumar

Partner  
Tax, SST & Customs Practice  
T: +603 6208 5813  
E: [sks@lh-ag.com](mailto:sks@lh-ag.com)

#### Our sub-specialisation includes:

##### INCOME TAX

- Tax Litigation & Dispute Resolution Proceedings
- Tax Advisory & Planning
- Tax Audit & Investigation
- Transfer Pricing & Thin Capitalisation

##### INTERNATIONAL TAX

(Including Cross-border Transaction Tax & Withholding Tax)

##### SALES & SERVICE TAX

- SST Litigation
- SST Legal Advisory
- SST Audit & Investigation
- Anti-Profitfiltering

##### CUSTOMS DUTY, EXCISE DUTY, SAFEGUARD DUTY & ANTI-DUMPING DUTY

##### TRADE FACILITATION & INCENTIVES

##### REAL PROPERTY GAINS TAX

##### PETROLEUM INCOME TAX

##### SALES & SERVICES TAX

##### STAMP DUTY

[www.lh-ag.com](http://www.lh-ag.com)

## Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia  
Tel: +603 6208 5888  
Fax: +603 6201 0122  
Email: [tax@lh-ag.com](mailto:tax@lh-ag.com)

