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### Crypto in the IRB's Crosshairs: Debunking 3 Myths for Traders and Dabblers

Much has changed since the Inland Revenue Board (“IRB”) last updated its Guidelines on Tax Treatment of Digital Currency Transactions in August 2022 (“2022 Crypto Guidelines”)<sup>1</sup>. The recent launch of Ops Token<sup>2</sup> (IRB’s vaunted programme to combat tax revenue leakage in cryptocurrency trading) in collaboration with the Royal Malaysian Police Department (“RMP”) underscores the urgent need for those involved in cryptocurrency (“Crypto”) activities to reassess their tax exposure and risks. Here are three common myths.

<sup>1</sup> See our [LHAG Insights: Tax Treatment of Digital Currency Transactions: Updated Guidelines by the Inland Revenue Board \(IRB\) dated 26 August 2022](#); See IRB’s 2022 Guidelines accessible [here](#)

<sup>2</sup> See News Report titled “LHDN targets cryptocurrency traders for taxes” dated 20 June 2024, accessed at: <https://www.thestar.com.my/news/nation/2024/06/20/lhdn-targets-cryptocurrency-traders-for-taxes>; See News Report titled “LHDN says has identified individuals, companies involved in crypto trading” dated 19 June 2024, accessed at: <https://theedgemaalaysia.com/node/715951>; See IRB’s Media Statement titled “Perluasan Asas Cukai Terus Diperkasa Menerusi Operasi Pematuhan Khas “Ops Token”” (available in Malay language only), dated 15 June 2024 accessed at: <https://www.hasil.gov.my/media/f0vfbzv3/20240615-kenyataan-media-hasil-perluasan-asas-cukai-terus-diperkasa-menerusi-operasi-pematuhan-khas-ops-token.pdf>

## **Myth 1: Virtual Transactions Are Safe from Scrutiny**

Many believe virtual transactions are safe from scrutiny, particularly when carried out using foreign Crypto exchanges without a Malaysian presence. However, Ops Token has shown that the Crypto world is not immune to the IRB's reach. The IRB has wide powers under Sections 80 and 81 of the Income Tax Act 1967 ("**ITA**") to access buildings and documents, and to request for information from any person. This includes digital devices and the relevant passwords and passcodes. These powers are further augmented by the resources and capabilities of the RMP.

The Director General of Inland Revenue ("**DGIR**") has proclaimed that Ops Token has been able to uncover Crypto trading data in mobile devices, and computers and that *"the data received will be analysed in detail to obtain the value of the cryptocurrency assets traded and the profit generated from it"*.

Failure to cooperate, such as refusing to provide access and passwords to digital devices, could constitute obstruction under Section 116 of the ITA, which is punishable upon conviction with a fine of between RM 1,000 and RM 10,000 or imprisonment of up to 1 year, or both.

## **Myth 2: No Taxes are Payable If You Do Not Trade for a Living**

Crypto dabblers often believe that their involvement is insufficient to warrant the IRB's attention. These may be, for instance, individuals with day jobs or businesses who started buying and selling Crypto assets as a hobby.

### Have you applied the “badges of trade”?

The IRB’s 2022 Crypto Guidelines recognise that active traders may be viewed as generating revenue and hence taxable, while gains derived by individuals who “trade occasionally” may be viewed as capital gains and not taxable in Malaysia. However, even a side hobby may be viewed by the IRB as a trading activity. The IRB regards investment activities as taxable if they are “continuous, systematic, active, carry a financial risk, and are aimed at making a profit”. One must also consider the application of the “badges of trade” to the transaction in question<sup>3</sup>.

### Have you been engaged in an “adventure in the nature of trade”?

In *Rutledge v The Commissioners of Inland Revenue*<sup>4</sup>, the taxpayer had purchased one million toilet rolls on a business trip to Germany, which he sold for a considerable profit upon his return to the United Kingdom (“UK”). He was not a trader in toilet paper. He was a money lender with various business interests and was simply offered the opportunity to purchase the toilet paper cheaply while in Germany. Nevertheless, the transaction was held to be taxable as an “adventure in the nature of trade” as it was made neither for the taxpayer’s own use nor for investment purposes. In short, even an isolated one-off transaction can be treated as a taxable, revenue transaction.

### Have you considered the application of Capital Gains Tax (“CGT”)?

According to the 2022 Crypto Guidelines, those who buy Crypto assets for long-term investment may enjoy a capital gain upon their disposal, which would not be subject to tax “as there are not capital gains

<sup>3</sup> See our [LHAG Insights: Tax Treatment of Digital Currency Transactions: Updated Guidelines by the Inland Revenue Board \(IRB\) dated 26 August 2022](#)

<sup>4</sup> (1929) TC 490; See *Ketua Pengarah Hasil Dalam Negeri v Revenue Point Sdn Bhd* [2024] CLJU 1027 (Court of Appeal) (COA)

taxes in Malaysia”. This has obviously been superseded by the introduction of CGT on 29.12.2023<sup>5</sup>.

Even if your transactions are not seen as trading activities, they might still be taxed as gains from the disposal of capital assets under Section 4(aa) of the ITA. Currently (after 20.5.2024)<sup>6</sup>, capital assets mean<sup>7</sup>:

- Movable or immovable property situated outside Malaysia, including any rights or interests thereof; or
- Movable property situated in Malaysia, which is a share of a company incorporated in Malaysia not listed on the stock exchange, owned by a company, limited liability partnership (LLP), trust body, or cooperative (co-op) society.

In short, CGT may apply on the disposal of Crypto assets “situated outside Malaysia” (“**Foreign Crypto Assets**”)<sup>8</sup>. CGT would not apply to Crypto assets situated in Malaysia; currently, only unlisted Malaysian shares owned by a company, LLP, or co-op society fall within the scope of CGT for Malaysian assets.

The location of Crypto assets poses interesting questions, on which the following considerations, among others, may be relevant:

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<sup>5</sup> See our [LHAG Insights: Navigating Capital Gains Tax; Roadmap to a New Tax Landscape dated 26 February 2024](#); and [LHAG Special Alert: CGT vs RPGT: A Flowchart Guide dated 7 June 2024](#)

<sup>6</sup> After the gazetting of the Income Tax (Amendment) Act 2024; see our [LHAG Special Alert: CGT vs RPGT: A Flowchart Guide dated 7 June 2024](#)

<sup>7</sup> See the definition of “capital asset” in Section 2 of the ITA

<sup>8</sup> See the IRB’s Guidelines titled: “Tax Treatment on Gains from the Disposal of Foreign Capital Assets Received from Outside Malaysia” dated 27 March 2024, accessed at: [https://www.hasil.gov.my/media/njjlpncs/20240426-tax-treatment-on-gains-from-the-disposal-of-foreign-capital-assets-received-from-outside-malaysia\\_amendment.pdf](https://www.hasil.gov.my/media/njjlpncs/20240426-tax-treatment-on-gains-from-the-disposal-of-foreign-capital-assets-received-from-outside-malaysia_amendment.pdf)

- **Location of transactions:** Where were the physical locations of the buyer or seller when the relevant transaction was carried out?
- **Storage medium:** Are the Crypto assets stored on physical devices (e.g., hardware wallets or cold wallets)? If so, where were the physical locations of these devices during the relevant transactions? Are these the location of “control” for the Crypto asset in question?
- **Crypto Exchange Location & Governing Law:** Are the Crypto assets held on an exchange? If so, where is the exchange based? What are the governing laws for the exchange?
- **Location of Blockchain Nodes:** Where are the nodes validating the transactions located?
- **Contractual Agreements:** Are there any relevant agreements between the transacting parties that may have specified the location of the Crypto assets? For instance, what is the chosen law by the parties for the relevant transactions?

Understanding these considerations will help determine the correct treatment for gains from the disposal of Crypto assets under the new CGT regime.

### **Myth 3: No Taxes are Payable if You Trade in Foreign Crypto Assets Only**

As highlighted above, the disposal of Foreign Crypto Assets may now be taxable under Section 4(aa) of the ITA. It is not enough to establish that a particular Foreign Crypto Asset is situated outside Malaysia. It may also be necessary to establish which specific country the asset is located in to determine whether

the taxpayer may qualify for any exemption on foreign source income (“**FSI**”).

Prior to 1 January 2022, paragraph 28(1), Schedule 6 of the ITA provided a blanket exemption on FSI, i.e., income derived from outside Malaysia and received in Malaysia. In its place, the Income Tax (Exemption) (No. 5) Order 2022 (**PU(A) 234/2022**) exempts individuals from the payment of income tax for all foreign income (excluding income from a partnership business in Malaysia) received in Malaysia until 31.12.2026.

The PU(A) 234/2022 exemption is subject to the condition that the FSI had been “subjected to tax of a similar character to income tax under the law of the territory where the income arises” (“**Country of Origin**”)<sup>9</sup>. This requires analysing and applying the tax laws of the Country of Origin, which can only be carried out after determining the Country of Origin.

## Concluding Thoughts

Have you carried out a proper evaluation of your tax exposure and risks from Crypto activities? Are you safe based on your own assessment and understanding of the law, or have you sought proper legal and tax advice? The hammer will fall – it is not a question of if, but when. Proper preparation is advised to ensure compliance and preparedness for when the IRB comes knocking.

In the meantime, it is hoped that the IRB will issue updates to its 2022 Crypto Guidelines as these have been rendered somewhat obsolete by the introduction of CGT and changes in the tax landscape relating to FSI.

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<sup>9</sup> See the IRB’s Guidelines titled “Tax Treatment in relation to Income Received from Abroad (Amendment) dated 20 June 2024 (**2024 FSI Guidelines**)”, accessed here: <https://www.hasil.gov.my/media/fzofh1gz/20240620-guidelines-tax-treatment-in-relation-to-income-received-from-abroad-amendment-june-2024.pdf>

If you have any questions relating to the tax treatment of Crypto transactions, please contact Partner [Chris Toh Pei Roo](mailto:tpr@lh-ag.com) ([tpr@lh-ag.com](mailto:tpr@lh-ag.com)).

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