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Latest Public Ruling, Guidelines, Tax Cases and more

August 2022

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Greetings from Deloitte Malaysia Tax Services

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Inland Revenue Board of Malaysia

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Important deadlines:

Task	Deadline
	31 August 2022
1. 2023 tax estimates for companies with September year-end	√
2. 6th month revision of tax estimates for companies with February year-end	√
3. 9th month revision of tax estimates for companies with November year-end	√
4. Statutory filing of 2022 tax returns for companies with January year-end	√
5. Maintenance of transfer pricing documentation for companies with January year-end	√
6. 2022 CbCR notification for applicable entities with August year-end	√

1. Public Ruling No. 1/2022 - Time Limit for Unabsorbed Adjusted Business Losses Carried Forward

The Inland Revenue Board of Malaysia (IRBM) has recently uploaded the Public Ruling (PR) No.1/2022 - Time Limit For Unabsorbed Adjusted Business Losses Carried Forward (dated 30 June 2022) on its website.

This PR is the first edition, and its objective is to provide an explanation on the time limit for unutilised or unabsorbed adjusted business losses arising from a business of a person to be carried forward.

The PR covers the following:

1. Objective
2. Relevant Provisions of the Law
3. Interpretation
4. Introduction
5. Ascertainment of Adjusted Income or Loss of a Business
6. Statutory Income of a Business
7. Aggregate Income
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Please refer to the Public Ruling (PR) No.1/2022 for full details and illustrative examples for guidance.

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2. Administrative changes to the 2% withholding tax deduction by a payer company on payment to a resident individual agent, dealer or distributor

The IRBM has issued a media release dated 9 July 2022 (available in Bahasa Malaysia language only) to notify taxpayers on the administrative changes to the remittance of 2% withholding tax (WHT) on payments made by a company to a resident individual agent, dealer or distributor (ADD) pursuant to Section 107D of the Income Tax Act, 1967 (ITA).

[Note: In relation to the above, taxpayers are advised to refer to the Frequently Asked Questions (FAQ) dated 17 March 2022 for guidance on the remittance of 2% WHT.]

The salient points are as follows:

1. Effective from July 2022, instead of deducting the 2% WHT on each payment in monetary form to the resident individual ADD and remitting the WHT due within thirty (30) days after paying or crediting each payment, the IRBM requires all companies that make payment to a resident individual ADD to accumulate the 2% WHT deducted from each payment to the resident individual ADD on a monthly basis. The accumulated 2% WHT deductions shall then be remitted to the IRBM not later than the last day of the following month. Please refer to the table below for an illustrative example as extracted from the media release.

Potongan Cukai 2% Terkumpul Mengikut Bulan	Tarikh Akhir Perlu Diremit Kepada KPHDN
1 – 31 Julai 2022	31 Ogos 2022
1 – 31 Ogos 2022	30 September 2022
1 – 30 September 2022	31 Oktober 2022

2. Before remitting the accumulated 2% WHT deductions to the IRBM (including payments made directly at the IRBM's payment counter or via post), the IRBM requires all paying companies to submit Form CP107D – Pin 2/2022 and Appendix CP107D(2) (the requisite documents) which can be downloaded from the IRBM's website, via e-mail to the following payment centres:

Pusat Bayaran	Alamat e-mel
Pusat Bayaran Kuala Lumpur	pbkl-cp107d@hasil.gov.my
Cawangan Kuching	pbkc-cp107d@hasil.gov.my
Cawangan Kota Kinabalu	pbkk-cp107d@hasil.gov.my

3. Upon submitting the required documents via e-mail to the respective payment centre, the paying company shall submit a copy of the e-mail when remitting the accumulated 2% WHT deductions to the IRBM via the respective payment centre for their verification before a payment receipt is issued.

4. The paying company must ensure that the number of recipients, the sum of accumulated 2% WHT deductions and the cheque number provided in the required documents are in order. Besides, the paying company shall also ensure that the recipient has an income tax reference number before submitting Appendix CP107D(2). Otherwise, the recipient is required to register for an income tax reference number via e-Register.

5. The payments made to an ADD in the year of assessment (YA) 2022 are subject to the 2% WHT deduction if the payments to such ADD in the immediate preceding YA (i.e. YA 2021) exceeds the threshold value of RM100,000 (whether monetary or otherwise).

Please refer to the media release and FAQ.

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3. Technical Guidelines on Tax Treatment of Developers or Management Bodies for the Maintenance and Management of Buildings and Joint Property

On 18 July 2022, the IRBM issued the Technical Guidelines on the Tax Treatment of Developers or Management Bodies for the Maintenance and Management of Buildings and Joint Property [the Guidelines] (available in Bahasa Malaysia language only). The Guidelines explain the tax treatment of developers or management bodies for the maintenance and management of buildings and joint property. Taxpayers can refer to the example of tax computation for a management corporation provided in "Lampiran 1" of the Guidelines for guidance.

The Guidelines substantially revised and replaced the earlier Guidelines on Tax Treatment of Charges for Maintenance and Joint Property Management Received by a Developer, Joint Management Body and Management Corporation dated 21 May 2012.

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4. Discussion forum between IRBM and CTIM on Profiling Issues

The Chartered Tax Institute of Malaysia (the Institute) is aware that the Intelligence and Profiling Department of the IRBM has been requesting for information involving tax practitioners and their clients (including the names, identity card numbers, tax reference numbers, contact numbers, etc.) for the purpose of gathering data from the tax practitioners and other industries at large.

In view of the above, the Institute held a virtual meeting and discussion forum with the IRBM on 21 June 2021 and 9 March 2022 respectively to discuss the arising issues . The IRBM has provided confirmation on the following matters:

1. Moving forward, the IRBM's request for information/details in respect of its data collection exercise will be of a more "targeted" approach. In line with that, the IRBM will be revising the format of the letter requesting information/details from the taxpayers/tax agents.

2. Not all information/details requested by the IRBM from the taxpayers/tax agents as part of its information gathering exercise must be submitted to the IRBM. Unlike in a tax audit or investigation, it is accepted by the IRBM that for the Intelligence and Profiling Department's information gathering exercise, only information/details that are readily available in the hands of taxpayers/tax agents are expected to be submitted to the IRBM.

3. The submission of only readily available information/details as mentioned in item 2 above will not be deemed as incomplete information, and taxpayers/tax agents will not be subject to penalty.

The main objective of the IRBM in collecting the above-mentioned information is to address the issue of omission, tax leakage, and economic issues that are detrimental to the government and to provide a great impact on the development and well-being of the country. Taxpayers are expected to comply and provide full cooperation in chanelling the requested information by the IRBM in accordance with the above-mentioned points no. 1 - 3.

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5. Gunung Lang Development Sdn Bhd v DGIR (HC)

This was an appeal filed by the taxpayer, Gunung Lang Development Sdn Bhd against the Director General of the IRBM (DGIR) for the whole decision of the Special Commissioners of Income Tax (SCIT). The summary of SCIT's views are as follows:

- The DGIR was not time-barred by Section 91(3) of the ITA for raising assessment for the YAs 2011 and 2012 on the grounds that the taxpayer was negligent or otherwise fraudulent in reporting its income.

- The taxpayer's income from the disposal of lands should be declared based on the respective dates of the Sales and Purchase Agreements (SPAs) under Section 24(1) of the ITA regardless of whether the conditions precedent under the SPAs were fulfilled.

- The DGIR was right in law and in order to impose a 45% penalty under Section 113(2) of the ITA on the taxpayer.

Issues:

Whether the decision of the SCIT was correct in law in deciding that the:

1. 45% penalty imposed by the DGIR on the taxpayer under Section 113(2) of the ITA was reasonable; and

2. Withdrawal of paragraph 5 of the Statement of Agreed Facts (Statement) by the DGIR was correct and did not result in a breach of natural justice.

Decision:

The High Court (HC) allowed the taxpayer's appeal and overturned the SCIT's decision with the following grounds of judgement:

1. Section 113(2) of the ITA provides that *where a person makes an incorrect return by omitting or understating any income of which the ITA requires him, and no prosecution has been instituted in respect of the incorrect return or incorrect information, the DGIR may require that person to pay the penalty equivalent to the amount of tax that has been undercharged as a consequence of the incorrect return or incorrect information.* The word "may" here indicates that the DGIR has the discretion to impose a penalty in consequence of the incorrect return or incorrect information. Based on the judgement in the case of *KPHDN* v *Kim Thye & Co*, the HC held that the DGIR's discretion must be exercised judiciously, and in accordance with the law and it is not unfettered.

2. In this case, the HC was of the view that the issue of declaration of income was mainly due to the reliance on the management accounts by the taxpayer. This is because the terms of the purported costs in respect of infrastructure works provided in the management accounts do not reconcile with the terms provided in cl 1(b)(iii) of the SPA. The taxpayer could not depart from the provision of the SPA to claim the expenses on the infrastructure works, as the SPA stated that the purchaser should bear the cost of the infrastructure works. As noted in cl 12(c) of the SPA and Section

10 of the Schedule to the SPA, the purchaser would reimburse the exact amount of expenses incurred by the taxpayer in respect of the completion of the infrastructure and amenities.

3. As such, the HC ruled that the taxpayer failed to show at the trial before the SCIT, that in the exercise of his discretion in imposing the penalty, the DGIR was acting according to his whim and fancy. Such notion was supported by the SCIT's finding of fact that the percentage of the penalty was not imposed by the system but by the DGIR acting manually.

4. The HC also agreed that the proceeds of the purchase price under the SPAs were receivable at the respective date of the SPAs. Although the subdivisions of the Land were yet to be carried out, the HC ruled that the details of the respective Lots were clearly determined by the parties in the SPA with the terms and conditions of the SPA being certain and capable of being made certain. The HC is clear that if the sub-division exercise was rejected by the relevant authorities or certain purchasers failed to settle the balance payment of the purchase price, the SPAs could be terminated, and the stock would be restored in the taxpayer's inventories. The taxpayer could then make the necessary adjustment to its income.

5. Regarding the breach of natural justice, the HC ruled that the SCIT has erred in law by allowing the DGIR to strike out paragraph 5 of the Statement of Agreed Facts, which was marked as Exhibit A. The Statement once marked as an exhibit cannot be altered, otherwise it is akin to tampering regardless of whether it was signed by both parties later. The ruling made by the SCIT amounted to the reopening of the agreed fact, which is not allowed in accordance with the judgement of the *Public Bank Bhd* v *Paramjit Singh Gill*. The HC held that the proper procedure would be for the SCIT to direct the parties to prepare a fresh Statement and mark it as an additional exhibit.

6. In view of the above, the HC held that the trial before the SCIT was conducted in a manner which prejudiced the taxpayer as he had prepared the case and related documents based on the Statement. In fact, the cross-examination of Senior Revenue 1 was also based on the Statement. As such, to amend Exhibit A without giving the taxpayer an opportunity to reassess its trial strategy is a clear breach of the maxim of *audi alteram partem*.

7. With the above in mind, the HC allowed the taxpayer's appeal and as a consequential order, the additional tax of RM9,297.50 and the penalty of RM2,326,341.83 paid by the taxpayer are nullified and must be refunded by the DGIR.

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6. Jurutera Teras Bistari v Pesuruhjaya Khas Cukai Pendapatan & Anor (HC)

In an appeal filed to the HC, the taxpayer, Jurutera Teras Bistari Sdn Bhd filed 2 judicial review (JR) applications against the SCIT and the DGIR (the respondents) for their decisions in dismissing the taxpayer's application for an extension of time to file for an appeal against a tax assessment, via their Deciding Order (DO)/decision dated 23 March 2020 and 28 January 2020 respectively. [*Note: As at the date of publication of this newsletter, the details of the SCIT's decision are not available yet.*]

Issues:

1. Whether JR application to quash the DGIR's decision dated 28 January 2020 was out of time;

2. Whether there was a breach of natural justice in dismissing the taxpayer's application for an appeal; and

3. Whether the SCIT was wrong in law and facts for issuing a DO before the completion of a hearing of appeal.

Decision:

The HC dismissed the taxpayer's JR applications and upheld the SCIT's decision with the following grounds of judgement [*Note: The taxpayer has since filed an appeal against the decision of the HC.*]:

1. The HC held that there was no dispute that the JR application was filed within the prescribed 3-months period of the DO under 053 Rules of Court 2012. This is because the entire process leading to the DO was one and the time to file the application was 3 months upon receipt of the final decision which was the SCIT's DO and not the initial decision by the DGIR [*see MyTeksi Sdn Bhd & Ors v Competitions Commission* as well as *Raffles Ecology Park Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan & Anor*].

2. Regarding the merits of both JR applications, the HC ruled that it was a trite law that the SCIT's decision may be reviewed on the grounds of illegality, irrationality or procedural impropriety [*see R Rama Chandran v Industrial Court of Malaysia & Anor* and *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*] notwithstanding Section 100(5) of the ITA which states that the SCIT's decision is final.

3. The HC also held that the decisions of the SCIT and the DGIR did not stem from mere technical objections, but from what was provided in Section 99(1) of the ITA. Section 99(1) of the ITA allows a taxpayer to appeal against an assessment within 30 days from the service of the notice of assessment. However, the taxpayer failed to adhere to the timeline stipulated under Section 99(1) of the ITA despite knowing that MARA had postponed the project.

4. Although there was no dispute that the taxpayer filed an application for an extension of time under Section 100 of the ITA after a period of 5 months and 16 months of the assessments being issued, the HC held that Section 100(2) of the ITA empowers the DGIR to exercise a discretion and ruled that the DGIR must be satisfied that there was reasonable cause that prevented the taxpayer to file the notice of appeal within 30 days. Based on Section 100(2) of the ITA, the DGIR outlined the reasons for rejecting the taxpayer's application for an extension of time. Whilst the SCIT did not provide the grounds for dismissing the appeal, the HC safely assumed that the same reasoning was adopted by them in the SCIT's DO. The HC did not agree with the taxpayer's contention that the DGIR tainted the SCIT's decision to similarly dismiss the application, as the SCIT's DO clearly ruled that the SCIT had considered the application as well as the grounds for appeal as provided by the taxpayer.

5. On the issue of process, the HC held that both the SCIT and DGIR were not guilty of any procedural impropriety as the process under Section 100 of the ITA had been complied with. There was also no breach of natural justice as the taxpayer was given the opportunity to file the application for an extension of time to appeal, with the grounds for the rejection of such application were also provided to the taxpayer. The decision not to grant the extension was not an irrational decision as there were guidelines in place for allowing such applications, which were depended on by the SCIT and the DGIR respectively. The contention that the DGIR had taken an irrelevant consideration where the taxpayer was a habitual defaulter had no merit, as it was clear that the basis for the decision to dismiss the application for extension of time was that the reasons proffered for the extension were not acceptable.

6. Whilst there was no doubt that the taxpayer may be prejudiced by the decision not to allow the application for an extension of time, the fact remained that there were specific timeframes given to the taxpayer to appeal which they did not adhere to. The HC was of the view that if prejudice was the only criteria, then all the timelines provided would be redundant and taxpayers would be given a license to not adhere to the specific timelines given with impunity. The HC held that the taxpayer had exercised its right to apply for extension for its failure to appeal within 30 days and the respondents had similarly exercised their discretion by not allowing such application. There was no error of law that warranted the issuing of an order of certiorari to quash the decisions of the respondents.

7. Finally, the HC also held that the SCIT was not wrong in law and facts for issuing a DO before the completion of a hearing of appeal as provided in paragraph 23 of Schedule 5 of the ITA. This is because Section 100(5) of the ITA clearly mandated the SCIT to notify their decision in writing and this had certainly been done via the DO. The HC held that there was nothing that prohibited the communication of the SCIT's decision in writing via a DO under Section 100(5) of the ITA. As such, it was not wrong or ultra vires.

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7. Petronas Trading Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)

This is an application for leave to commence judicial review against the Respondent for inter alia an order for certiorari to quash the notice of assessment for the YA 2013 to YA 2017 all dated 30 December 2020 (the Decision).

Issue:

Whether the Applicant's grievance ought to be ventilated before the SCIT and not by way of judicial review.

Decision:

The HC has granted order in terms of the Applicant's application for leave to commence judicial review. The HC further granted the stay of the Respondent's Decision until the full and final determination of the judicial review to preserve the status quo, prevent nugatory effect and the Applicant's full benefits of success. The grounds of judgement are as follows:

1. There are exceptional circumstances in the Applicant's application that merit judicial review. The Respondent had clearly committed an error of law amounting to a clear lack of jurisdiction by raising the assessment for the YA 2013 to YA 2017 in disallowing the reassignment of income and expenses to the rightful legal owner, PETCO Trading Labuan Company Ltd (PTLCL).

2. Section 140A of the ITA does not permit the Respondent to disregard and re-characterise the Undisclosed Agency Agreement (UAA) and reassign the subsequent transactions from PTLCL to PETCO (*Note*). Section 140A and Section 140 of the ITA must be subject to the principle of strict interpretation. The internal guidelines and policy of the Respondent have no force of law and every exercise of statutory power such as the raising of assessment in this matter cannot be done arbitrarily.

3. Illegality, unlawful treatment, error of law and failure to adhere to legal principles established by courts by the Respondent constitute excess of jurisdiction that warrants the HC intervention by way of judicial review.

***Note**: We wish to highlight a recent change in the ITA regarding the re-characterisation of controlled transactions. With effect from 1 January 2021, through the insertion of Sections 140A(3A) and 140A(3B) to the ITA via the Finance Act 2020, the DGIR may disregard the structure in a controlled transaction, as well as make adjustments to that structure, as he deems fit.*

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8. Seiwa Podoyo Sdn Bhd v KPHDN (HC)

This was an appeal filed by the taxpayer, Seiwa Podoyo Sdn Bhd against the DGIR for the whole decision of the SCIT. The summary of the SCIT's findings are as follows:

- The assessment raised by the DGIR was not time-barred as the taxpayer was found to be negligent under Section 91(3) of the ITA for not complying with Public Ruling 2/2008 on "Reinvestment Allowance" (the PR).

- The new machines were not used for a "qualifying project". Hence, based on the PR, the reinvestment allowance (RA) is disallowed. The new product (plastic for ink cartridge) manufactured from the new machine is completely different from the original product (plastic for automotive) manufactured from the old machine.

- The DGIR was right in law and in order in imposing the penalty as the taxpayer was found to be negligent for not complying with the PR.

Issue:

Whether a company that changed its product from one form of plastic injection moulded product to another plastic injection moulded product can be said to be "diversifying" within the definition of Schedule 7A of the ITA.

Decision:

The HC held that public rulings have no force of law and the SCIT had erred in dismissing the taxpayer's appeal on the premise of non-compliance with the public ruling. The taxpayer's appeal was allowed on the following grounds:

1. Schedule 7A of the ITA allows a company involved in the manufacturing business to claim reinvestment allowance (RA) for undertaking a project in diversifying its existing business into any related product within the same industry. Based on Paragraph 8(a) of Schedule 7A of the ITA, the definition of a qualifying project includes diversifying the existing business into any related product within the same industry.

2. The two products of the taxpayer i.e. plastic components for automotive parts and plastic casing for ink cartridges, went through similar manufacturing processes. The products were related by virtue of having the same raw material

and manufacturing process within the plastic injection moulded products industry. Therefore, the taxpayer has undertaken diversifying activity within its core business activity.

3. Public rulings have no force of law, it was a representation of the DGIR's interpretation of the ITA. The SCIT had erred in dismissing the taxpayer's appeal on the premise of the taxpayer's non-compliance with the PR when the public ruling has no force of law.

4. The SCIT should not have found that the taxpayer was negligent as the issue of "negligence" was not raised by the DGIR.

5. It was the DGIR's contention that the assessment raised in the YA 2010 was not time-barred on the basis that the utilised RA was carried forward from YA 2009 to YA 2010. The fact that the taxpayer had carried forward the unutilised RA claimed in YA 2009 to YA 2010 does not mean that YA 2010 may be adjusted. Any adjustment must be made to the YA in which the RA was claimed, and, in this case, it was YA 2009. To disallow the taxpayer's RA claim, the deadline to raise any such assessment would be 31 December 2014. The DGIR raised the assessment for YA 2009 after 6 years, on 25 June 2015 and it was clearly time-barred.

6. The DGIR should not have acted mechanically in imposing penalties, and consideration must be given to the facts and circumstances of the case. Penalty should not be imposed on matters arising from technical adjustment (i.e. differing interpretation of legislation) as decided in *Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2015)*.

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Tax Team - Contact Us

Service lines / Names	Designation	E-mail	Telephone
Business Tax Compliance & Advisory			
Sim Kwang Gek	Managing Director	kgsim@deloitte.com	+603 7610 8849
Tan Hooi Beng	Deputy Managing Director	hooitan@deloitte.com	+603 7610 8843
Choy Mei Won	Executive Director	mwchoy@deloitte.com	+603 7610 8842
Suzanna Kavita	Director	sukavita@deloitte.com	+603 7610 8437
Business Process Solutions			
Julie Tan	Executive Director	jultan@deloitte.com	+603 7610 8847
Eugene Chow Jan Liang	Executive Director	euchow@deloitte.com	+605 254 0288
Shareena Martin	Director	sbmartin@deloitte.com	+603 7610 8925
Capital Allowances Study			
Chia Swee How	Executive Director	swchia@deloitte.com	+603 7610 7371
Sumaisarah Abdul Sukor	Associate Director	sabdulsukor@deloitte.com	+603 7610 8331
Deloitte Private			
Chee Pei Pei	Executive Director	pechee@deloitte.com	+603 7610 8862
Chan Ee Lin	Director	eelchan@deloitte.com	+604 218 9888
Kei Ooi	Director	soooi@deloitte.com	+603 7610 8395
Global Employer Services			
Ang Weina	Executive Director	angweina@deloitte.com	+603 7610 8841
Chee Ying Cheng	Executive Director	yichee@deloitte.com	+603 7610 8827
Michelle Lai	Director	michlai@deloitte.com	+603 7610 8846
Tan Keat Meng	Director	keatmeng@deloitte.com	+603 7610 8767
Government Grants & Incentives			
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Thin Siew Chi	Executive Director	sthin@deloitte.com	+603 7610 8878
Indirect Tax			
Tan Eng Yew	Executive Director	etan@deloitte.com	+603 7610 8870
Senthuran Elalingam	Executive Director	selalingam@deloitte.com	+603 7610 8879
Chandran TS Ramasamy	Director	ctsramasamy@deloitte.com	+603 7610 8873
Larry James Sta Maria	Director	lstamaria@deloitte.com	+603 7610 8636

Wong Poh Geng	Director	powong@deloitte.com	+603 7610 8834
Nicholas Lee Pak Wei	Director	nichlee@deloitte.com	+603 7610 8361
International Tax & Value Chain Alignment			
Tan Hooi Beng	Deputy Managing Director	hooitan@deloitte.com	+603 7610 8843
Kelvin Yee Rung Hua	Director	keyee@deloitte.com	+603 7610 8621
Mergers & Acquisitions			
Sim Kwang Gek	Managing Director	kgsim@deloitte.com	+603 7610 8849
Tax Audit & Investigation			
Chow Kuo Seng	Executive Director	kuchow@deloitte.com	+603 7610 8836
Mohd Fariz Mohd Faruk	Executive Director	mmohdfaruk@deloitte.com	+603 7610 8153
Wong Yu Sann	Director	yuwong@deloitte.com	+603 7610 8176
Tax Technology Consulting			
Senthuran Elalingam	Executive Director	selalingam@deloitte.com	+603 7610 8879
Cheong Mun Loong	Director	mucheong@deloitte.com	+603 7610 7652
Kelvin Kok	Director	kekok@deloitte.com	+603 7610 8157
Transfer Pricing			
Subhabrata Dasgupta	Executive Director	sudasgupta@deloitte.com	+603 7610 8376
Philip Yeoh	Executive Director	phyeoh@deloitte.com	+603 7610 7375
Gagan Deep Nagpal	Executive Director	gnagpal@deloitte.com	+603 7610 8876
Vrushang Sheth	Executive Director	vsheth@deloitte.com	+603 7610 8534
Tan Wei Chuan	Executive Director	wctan@deloitte.com	+604 218 9888
Justine Fan	Director	jufan@deloitte.com	+603 7610 8182
Anil Kumar Gupta	Director	anilkgupta@deloitte.com	+603 7610 8224

Sectors / Names	Designation	E-mail	Telephone
Automotive			
Choy Mei Won	Executive Director	mwchoy@deloitte.com	+603 7610 8842
Consumer Products			
Sim Kwang Gek	Managing Director	kgsim@deloitte.com	+603 7610 8849

Financial Services			
Mark Chan	Executive Director	marchan@deloitte.com	+603 7610 8966
Mohd Fariz Mohd Faruk	Executive Director	mmohdfaruk@deloitte.com	+603 7610 8153
Oil & Gas			
Toh Hong Peir	Executive Director	htoh@deloitte.com	+603 7610 8808
Kelvin Kok	Director	kekok@deloitte.com	+603 7610 8157
Real Estate			
Chia Swee How	Executive Director	swchia@deloitte.com	+603 7610 7371
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Gan Sin Reei	Director	sregan@deloitte.com	+603 7610 8166
Telecommunications			
Thin Siew Chi	Executive Director	sthin@deloitte.com	+603 7610 8878

Other Specialist Groups / Names	Designation	E-mail	Telephone
Chinese Services Group			
Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Japanese Services Group			
Mark Chan	Executive Director	marchan@deloitte.com	+603 7610 8966
Korean Services Group			
Chee Pei Pei	Executive Director	pechee@deloitte.com	+603 7610 8862

Branches / Names	Designation	E-mail	Telephone
Penang			
Ng Lan Kheng	Executive Director	lkng@deloitte.com	+604 218 9268
Tan Wei Chuan	Executive Director	wctan@deloitte.com	+604 218 9888
Au Yeong Pui Nee	Director	pnauyeong@deloitte.com	+604 218 9888
Monica Liew	Director	monicaliew@deloitte.com	+604 218 9888
Ipoh			
Mark Chan	Executive Director	marchan@deloitte.com	+603 7610 8966
Eugene Chow Jan Liang	Executive Director	euchow@deloitte.com	+605 254 0288
Lam Weng Keat	Director	welam@deloitte.com	+605 253 4828

Patricia Lau	Director	palau@deloitte.com	+605 254 0288

Melaka

Julie Tan	Executive Director	jultan@deloitte.com	+603 7610 8847

Johor Bahru

Thean Szu Ping	Executive Director	spthean@deloitte.com	+607 268 0988
Caslin Ng Yuet Foong	Director	caslinng@deloitte.com	+607 268 0850
Catherine Kok Nyet Yean	Director	nykok@deloitte.com	+607 268 0882

Kuching

Tham Lih Jiun	Executive Director	ljtham@deloitte.com	+603 7610 8875
Philip Lim Su Sing	Director	suslim@deloitte.com	+608 246 3311
Chai Suk Phin	Director	spchai@deloitte.com	+608 246 3311

Kota Kinabalu

Chia Swee How	Executive Director	swchia@deloitte.com	+603 7610 7371
Leong Sing Yee	Assistant Manager	sleong@deloitte.com	+608 823 9601

Sim Kwang Gek

Tan Hooi Beng

Choy Mei Won

Julie Tan

Eugene Chow Jan Liang

Chia Swee How

Chee Pei Pei

Ang Weina

Chee Ying Cheng

Tham Lih Jiun

Thin Siew Chi

Tan Eng Yew

Senthuran Elalingam

Chow Kuo Seng

Mohd Fariz Mohd Faruk

Subhabrata Dasgupta

Philip Yeoh

Gagan Deep Nagpal

Vrushang Sheth

Tan Wei Chuan

Mark Chan

Toh Hong Peir

Ng Lan Kheng

Thean Szu Ping

Suzanna Kavita

Shareena Martin

Michelle Lai

Tan Keat Meng

Chandran TS Ramasamy

Larry James Sta Maria

Wong Poh Geng

Nicholas Lee Pak Wei

Kelvin Yee Rung Hua

Chan Ee Lin

Kei Ooi

Wong Yu Sann

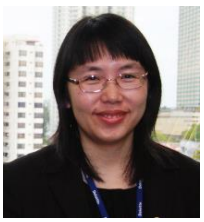
Cheong Mun Loong

Justine Fan

Anil Kumar Gupta

Kelvin Kok

Gan Sin Reei



Au Yeong Pui Nee

Monica Liew

Lam Weng Keat

Patricia Lau

Caslin Ng Yuet Foong

Catherine Kok Nyet Yean

Philip Lim Su Sing

Chai Suk Phin

Sumaisarah Abdul Sukor

Leong Sing Yee