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October 2022

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Greetings from Deloitte Malaysia Tax Services

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Deloitte Malaysia
Inland Revenue Board of Malaysia

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Upcoming events:

1. Global Minimum Tax Announced in Malaysia Budget 2023

Important deadlines:

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

1. Guidelines on tax treatment of digital currency transactions

The Inland Revenue Board of Malaysia (IRBM) issued technical guidelines on the tax treatment of digital currency transactions on 26 August 2022, which are effective as from the same date. The guidelines aim to enhance taxpayers' understanding of the IRBM's interpretation and application of the tax legislation with respect to certain digital currency transactions through illustrative examples, and also include coverage of the general tax treatment of digital currencies or digital tokens (collectively referred to as DCT) in Malaysia. According to the guidelines, transactions involving DCT will be subject to tax in Malaysia if the transactions are revenue in nature, as opposed to being capital in nature.

Overview of guidelines

The guidelines are based on the existing income tax provisions in Malaysia. In cases where Malaysia has an applicable tax treaty with a treaty partner jurisdiction, the guidelines provide that the existing treaty rules will apply. The guidelines are applicable to any person that acquires or disposes of DCT, and that is involved in the business of DCT, through activities such as trading, mining, and exchanges of DCT.

Section 3 of Income Tax Act, 1967 (ITA) provides that income of any person accruing in or derived from Malaysia, or received in Malaysia from outside Malaysia, is subject to income tax. According to the guidelines, the IRBM regards transactions involving DCT as being subject to income tax if key activities and business operations are performed in Malaysia or if the business has a presence in Malaysia.

Malaysia does not impose tax on capital gains arising from the disposal of DCT, i.e., only revenue gains arising from the disposal of DCT are taxable. Where a person actively trades DCT, gains arising from such trading will be subject to income tax, on the basis that the person is deemed to have generated income that is revenue in nature. In contrast, where a person occasionally trades DCT for long-term investment purposes, any gain that arises may be regarded as capital in nature, and therefore, will not be taxable in Malaysia. The IRBM relies on "badges of trade" to determine if a transaction involving DCT is capital or revenue in nature (details on badges of trade are provided in appendix A of the guidelines).

The definition of DCT in the guidelines is described below, followed by a discussion of some other salient points regarding its taxability.

Definition of DCT

According to the guidelines, the term DCT refers to digital financial assets that are based on distributed ledger technology and cryptographically secured digital representations of value or contractual rights that can be electronically transferred, stored, or traded. The term DCT also refers to digital currencies such as Bitcoin, Ethereum (Ether), or any other digital currencies that have similar characteristics.

Other salient points

Businesses that trade DCT in the ordinary course of business are subject to tax implications: profits derived from such trade will be taxable and expenses incurred in relation to the trading activity will be tax deductible. In contrast, where businesses buy and hold DCT for long-term investment purposes, gains on the disposal of the DCT will be treated as capital gains that are not subject to tax.

If a business accepts DCT as a form of payment for goods and services it provides, the business should ensure that transactions involving DCT are treated similarly to a normal business transaction, i.e., the DCT received in exchange for goods and services provided should be recorded as sales to the business based on the open market value of the goods or services in Malaysian ringgit (RM). In cases where the DCT has no published value, the valuation of the DCT received will be equivalent to the fair value of the goods and services exchanged. The same principles will apply if the business uses DCT for the payment of expenses and purchase of assets by the business.

Any person that carries on a business of mining of DCT, or that carries out mining activities with a view to making profit, will be subject to income tax according to the existing income tax provisions in Malaysia. In cases where the miners provide mining services to investors without the intention of owning the DCT themselves, the miners will be subject to tax on income received in respect of mining services provided to the investors.

If a company pays salaries and wages to its employees in DCT, the expenses incurred in relation to the payment of salaries and wages are tax deductible for the company. To qualify, the company must ensure that the value of salaries and wages is based on the employment contract and the value of the employment services performed. The salaries and wages received in DCT from the company are taxable in the hands of the respective employees.

A person may receive free DCT as part of a promotion or marketing tool, or due to the splitting of existing DCT such as airdrops and hardforks. In such cases, the free DCT received will not be regarded as income to that person, and therefore, not taxable at the time of receipt. However, a person may be subject to tax if the person receives DCT in exchange for certain goods or services, as mentioned above. The IRBM may subject gains from the disposal of the DCT to tax in the future if the gains are revenue in nature.

For tax purposes, taxpayers are required to determine the acquisition cost of the DCT (valued in RM) based on the first-in, first-out (FIFO) principle, unless taxpayers are able to prove an alternative basis for determining the acquisition cost. If taxpayers are unable to determine the acquisition cost of the DCT, the DCT will be valued using the fair value (i.e., at the rate in force on the day of the transaction, based on acceptable and verifiable digital currency exchanges).

Comments

Although the guidelines were issued and take effect on 26 August 2022, the IRBM has the authority to apply the principles set forth in the guidelines retroactively, as the guidelines are merely an interpretation of the existing income tax provisions in Malaysia. The guidelines provide taxpayers with guidance on the income tax treatment of transactions involving DCT, and therefore will be relevant to taxpayers that transact in digital currency or digital tokens. Taxpayers should ensure that proper records of all transactions involving DCT are retained for at least seven years, so that they are able to provide such records to the IRB in the event of a tax audit or upon request (the record retention period as required by the ITA is seven years, while the time bar for assessment of tax is five years for general cases and seven years for cases involving related-party transactions).

Please refer to the guidelines for full details and illustrative examples for guidance.

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2. IRBM updated Restriction on Deductibility of Interest Guidelines [Section 140C of the ITA]

Further to the release of the Income Tax (Restriction on Deductibility of Interest) (Amendment) Rules 2022 [P.U.(A) 27/2022], the IRBM has issued the Restriction on Deductibility of Interest Guidelines on 22 August 2022 (2022 Guidelines) to replace the previous Guidelines issued on 25 July 2019 (2019 Guidelines).

The updates and amendments are listed in Paragraph 13 of the 2022 Guidelines. The significant changes are outlined below:

1. Paragraph 3.10 – The definition of "qualifying deduction" in the formula for ascertaining the tax-EBITDA (i.e. earnings before interest, taxes, depreciation and amortisation) has been amended to align with the amended definition thereof legislated via P.U.(A) 27/2022 which is effective 1 February 2022 as reproduced below:

   "Qualifying deduction" means:

   *(a) **where business expenditure incurred** in the profit and loss account **is allowed as a deduction** under the ITA, an amount equal to **the difference between the amount of the deduction allowed and the amount of the business expenditure incurred** in the profit and loss account and this is provided that the amount of the deduction allowed exceeds the amount of the business expenditure incurred; or*
   *(b) the **amount of deduction allowable under the ITA** where there is **no business expenditure incurred** in the profit and loss account.*

2. Paragraph 6.7 – Inserted an explanation on the application of Earnings Stripping Rule (ESR) in a situation where the interest is not due to be paid as shown below:

   As provided under subsections 33(4) and 33(5) of the ITA, any interest payable which is not due to be paid in a particular year of assessment (YA) would have been excluded in arriving at the adjusted income (i.e. "A" in arriving at tax-EBITDA) for that YA. Technically, any interest payable that is not due to be paid is a disallowed deduction in arriving at "A" and therefore excluded from the computation of "C". Hence, a revision of tax-EBITDA for the relevant YA *when such interest is due to be paid is required. When the interest becomes due to be paid, the assessment for that YA will be revised by the taxpayer to allow a deduction of the interest pursuant to subsection 33(5) of the ITA.*

3. <u>Paragraph 8, Example 5: Carry Forward Excess Interest Expense</u> – The YA has been revised and an additional year "2025" has been added for clarity.

4. <u>Paragraph 9 – Non application</u>

   - Item (k) has been added to be aligned in accordance with P.U.(A) 175/2019 as follows:

     A person who has been granted an exemption under paragraph 127(3)(b) or subsection 127(3A) of the Act in respect of the adjusted income of the person.

   - Item (i) of the 2019 Guidelines has been removed:

     A special purpose vehicle (SPV) as defined under Subsection 60I(1) of the ITA.

5. <u>Paragraph 10 –</u> Clarification that P.U.(A) 27/2022 will take effect for the basis period beginning on or after 1 February 2022.

6. <u>Paragraph 10, Example 7: Applicability of P.U.(A) 175 and P.U.(A) 27 based on basis periods</u> – An example to illustrate the applicability of P.U.(A) 175/2019 and P.U.(A) 27/2022 according to basis period has been added.

Example 7: Applicability of P.U. (A) 175 and P.U. (A) 27 based on basis periods

The basis periods for DEF Sdn Bhd are:

Year of Assessment	Basis Period	Interest Restriction (Section 140C)
2019	1.1.2019 – 31.12.2019	Not Applicable
2020	1.1.2020 – 31.12.2020	Applicable under P.U. (A) 175
2021	1.1.2021 – 31.12.2021	Applicable under P.U. (A) 175
2022	1.1.2022 – 31.12.2022	Applicable under P.U. (A) 175
2023	1.1.2023 – 31.12.2023	Applicable under P.U. (A) 175 and P.U. (A) 27

P.U. (A) 27 will only be applicable for DEF Sdn Bhd beginning from the basis period for the year of assessment 2023 onwards.

*[**Note:** Based on Example 7 of the 2022 Guidelines, a company which closes its financial accounts on 31 December 2022 would only apply the definition of "qualifying deduction" under P.U.(A) 27/2022 from the YA 2023 onwards.]*

7. <u>Annex A to Annex D</u>

   - The examples in Annex A to Annex C have been revised to reflect the change in the definition of qualifying deduction in accordance with P.U.(A) 27/2022.
   - Annex D has been added to illustrate carry forward of excess interest expense in Example 5.
   - Note 1 to Annex A has been added to illustrate the determination of an expense falling under the new definition of "qualifying deductions" pursuant to P.U.(A) 27/2022.

Please refer to the 2022 Guidelines for full details and illustrative examples for guidance.

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3. Malaysia – US IGA on implementation of FATCA legislated [P.U.(A) 278/2022, P.U.(A) 279/2022 and P.U.(A) 280/2022]

The Foreign Account Tax Compliance Act (FATCA), which affects financial institutions (FIs) worldwide, aims at reducing tax evasion by United States (US) persons. It requires FIs outside the US to provide information regarding their customers who are US persons to the US Internal Revenue Service (US IRS). A 30% withholding tax is imposed on the US source income of any FIs that fail to comply with this requirement.

The US has developed Intergovernmental Agreement (IGA) models as tools to facilitate FIs' compliance with FATCA. The Malaysia-US IGA (Agreement) to implement FATCA was signed on 21 July 2021 and gazetted on 1 September 2022 as the Income Tax (Agreement Between the Government of Malaysia and the Government of the United States of America to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act) Order 2022 [P.U.(A) 278/2022].

The Income Tax (Automatic Exchange of Financial Account Information Between the Government of Malaysia and the Government of the United States of America to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act) Rules 2022 [P.U.(A) 279/2022] was also gazetted on 1 September 2022 in connection with the implementation of provisions on the obligations arising under the Agreement. The Rules which applies to a Malaysian FI, set forths the obligations to be complied.

Similarly, the Labuan Business Activity Tax (Automatic Exchange of Financial Account Information between the Government of Malaysia and the Government of the United States of America to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act) Regulations 2022 [P.U.(A) 280/2022] was also gazetted on 1 September 2022 to apply to Labuan entities for the same purpose.

Please refer to the P.U.(A) 278/2022, P.U.(A) 279/2022 and P.U.(A) 280/2022 for full details.

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4. Income Tax (Deduction for Expenses in relation to the Cost of Detection Test of Coronavirus Disease 2019 (COVID-19) for Employees) (Amendment) Rules 2022 [P.U.(A) 291/2022]

P.U.(A) 291/2022 (the Amendment Rules) was gazetted on 9 September 2022 to extend the scope of qualifying condition of the deduction provided under the Income Tax (Deduction for Expenses in relation to the Cost of Detection Test of Coronavirus Disease 2019 (COVID-19) for Employees) Rules 2021 [P.U. (A) 404/2021].

Subparagraph 2(1) of P.U.(A) 404/2021 allows an employer who is resident in Malaysia to claim a deduction in arriving at the adjusted income from his business, for an amount equivalent to the expenses incurred by that employer in respect of the cost of detection test of COVID-19 for its employees between the period of 1 January 2021 and 31 December 2021 (both dates inclusive), provided the expenses incurred is substantiated with a receipt and certification issued by a medical practitioner registered with the Malaysian Medical Council or a medical practitioner registered outside Malaysia that the detection test of COVID-19 has been provided to its employees. The amount of deduction allowed is an addition to any deduction allowed for the cost of detection test of COVID-19 under Section 33 of the ITA.

The Amendment Rules now allow employers to claim the above-mentioned deduction using receipt and result of their employees' COVID-19 detection test issued by any health facility listed in the List of Laboratories Conducting RT-PCR Test for Covid-19 to the COVID-19 Management Guidelines in Malaysia No. 5/2020 (issued by the Ministry of Health Malaysia) which remains in force in relation to the costs of RT-PCR detection test incurred for their employee.

*[**Note:** Employers that are eligible for the above-mentioned additional deduction in respect of qualifying expenses incurred based on the Amendment Rules but have submitted their Income Tax Return Form (ITRF) for the relevant period may apply for a relief in writing to the IRBM within five years after the end of the year the Amendment Rules were gazetted i.e. an application for relief shall be made on or before 31 December 2027.]*

Please refer to the Amendment Rules and P.U. (A) 404/2021 for more details.

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5. Petroleum (Income Tax) (Deductions for Employment of Disabled Persons) Rules 1989 [P.U.(A) 294/2022]

On 13 September 2022, the Malaysian government gazetted P.U.(A) 294/2022 (the Rules) to revise the Petroleum (Income Tax) (Deductions For The Employment of Disabled Persons) Rules 1989 [P.U.(A) 391/1989]. The P.U.(A) 391/1989 which has effect from the YA 1989 and subsequent YAs, was revised up to 22 August 2022 by the Commissioner of Law Revision under Section 13 of the Revision of Laws Act 1968. The Rules are appointed for coming into operation on 16 September 2022.

Salient points

1. The rules allow a chargeable person under the Petroleum (Income Tax) Act 1967 (the PITA) to claim deduction on remuneration of a kind allowable under Section 15 of the PITA payable to each employee who is physically or mentally disabled, provided the chargeable person is able to prove to the satisfaction of the Director General of IRBM that the said employee is physically or mentally disabled and is not able to perform the work of a normal person.

2. The above-mentioned deduction shall be in addition to any deduction allowable under Section 15 of the PITA.

*[**Note**: Section 15 of the PITA provides the list of deductions in respect of outgoings and expenses which are allowable for a chargeable person to arrive at his adjusted income or adjusted loss.]*

Please refer to the Rules for more details.

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6. Petroleum (Income Tax) (Accelerated Capital Allowances) (Late-Life Assets Production Sharing Contract) Rules 2022 [P.U.(A) 301/2022]

P.U.(A) 301/2022 (the Rules) was gazetted on 27 September 2022 to legislate the proposed tax incentive for Late-Life Assets (LLA) project for upstream petroleum industry as announced in the National Budget 2022. The Rules which aim to attract oil and gas companies to invest and venture into LLA project are deemed to have come into operation on 1 January 2020.

Application

The Rules shall apply to a chargeable person who:

(a) has signed an LLA production sharing contract within the period from 1 January 2020 to 31 December 2029 (both dates inclusive); and
(b) in a basis period for a YA has incurred qualifying plant expenditure under the Second Schedule to the PITA solely for the purpose of carrying out a petroleum operation in relation to that LLA production sharing contract.

Salient points

1. The Minister of Finance (the Minister) may determine a project as a LLA project, if such project is operated in a brownfield oil or gas field and has an economic lifespan not exceeding ten years commencing from the year a LLA production sharing contract is signed.

2. An initial allowance of twenty percent and an annual allowance of forty percent shall be given to a chargeable person who incurs qualifying plant expenditure for the purpose of carrying out a petroleum operation in relation to a LLA project.

3. Where an asset which qualifies for the allowances as mentioned above is disposed of within one year from the date of its acquisition, the allowances which have been allowed to the chargeable person under the Rules shall be withdrawn in the basis period for the YA in which the asset is disposed of.

Relevant definitions

- "Brownfield oil or gas field" refers to an oil or gas field that has been developed and has reached a peak level of oil or gas production rate.

- The word "disposed of" has the same meaning assigned to it in Paragraph 40 of the Second Schedule to the PITA (i.e., sold, discarded or destroyed or ceased to be used for the purposes of petroleum operations).

Non-application

The Rules shall not apply to a chargeable person in the basis period for a YA where the chargeable person:

(a) has been granted accelerated capital allowance under the Petroleum (Income Tax)(Accelerated Capital Allowances) (Marginal Field) Rules 2013 [P.U.(A) 119/2013];
(b) has been granted an investment allowance under the Petroleum (Income Tax) (Investment Allowance) Regulations 2013 [P.U.(A) 120/2013];
(c) has been granted tax exemption under the Petroleum (Income Tax) (Exemption) Order 2013 [P.U.(A) 122/2013];
(d) has been granted accelerated capital allowance under the Petroleum (Income Tax) (Accelerated Capital Allowances) (PETRONAS Marginal Field) Rules 2014 [P.U.(A) 304/2014];
(e) has been granted tax exemption under the Petroleum (Income Tax) (Exemption) Order 2014 [P.U.(A) 305/2014];
(f) has been granted an investment allowance under the Petroleum (Income Tax) (Investment Allowance for PETRONAS) Regulations 2021 [P.U.(A) 336/2021];
(g) carries on petroleum operations in the Joint Development Area; or
carries on petroleum operations in an area under any agreement or arrangement made by the Government with any government of any territory outside Malaysia for the joint exploration and exploitation of petroleum in overlapping areas.

Please refer to the Rules for more details.

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7. Petroleum (Income Tax) (Exemption) Order 2022. [P.U.(A) 302/2022]

P.U.(A) 302/2022 (the Order) was gazetted on 27 September 2022 to legislate the proposed tax incentive for LLA project for upstream petroleum industry as announced in the National Budget 2022. The Rules which aim to attract oil and gas companies to invest and venture into LLA project are deemed to have come into operation on 1 January 2020.

Salient points

1. The Minister exempts the chargeable person in the basis period for a YA, from the payment of petroleum income tax in respect of statutory income derived from petroleum operations in relation to LLA production sharing contract.

2. To qualify for the above-mentioned exemption, the chargeable person shall ensure that he has signed an LLA production sharing contract with PETRONAS within the period from 1 January 2020 to 31 December 2029 (both dates inclusive).

3. The Minister may determine a project as an LLA project, if such project is operated in a brownfield oil or gas field and has an economic lifespan not exceeding ten years commencing from the year a LLA production sharing contract is signed.

4. The statutory income as mentioned above shall be determined in accordance with the prescribed formula as illustrated below:

$$\frac{A}{B} \times C$$

where A is the chargeable tax of the chargeable person in respect of its petroleum operations in relation to the Late-Life Assets production sharing contract which is equal to thirty-eight per cent of its chargeable income reduced by the chargeable tax which is equal to twenty-five per cent of its chargeable income;

B is the chargeable tax of the chargeable person in respect of the petroleum operation in relation to the Late-Life Assets production sharing contract which is equal to thirty-eight per cent of its chargeable income; and

C is the amount of such chargeable income.

5. To determine the chargeable income as illustrated in the prescribed formula above, the statutory income shall be ascertained in accordance with Chapter 4 of Part III of the PITA and by having regard to the Petroleum (Income Tax) (Accelerated Capital Allowances) (Late-Life Assets Production Sharing Contract) Rules 2022 [P.U. (A) 301/2022].

Relevant definitions

- "PETRONAS" refers to Petroliam Nasional Berhad as mentioned in Section 3(1) of the Petroleum Development Act 1974.

- A "brownfield oil or gas field" refers to an oil or gas field that has been developed and has reached a peak level of oil or gas production rate.

Non-application

The Order shall not apply to a chargeable person in the basis period for a YA where the chargeable person:

(a) has been granted accelerated capital allowance under the Petroleum (Income Tax)(Accelerated Capital Allowances) (Marginal Field) Rules 2013 [P.U.(A) 119/2013];
(b) has been granted an investment allowance under the Petroleum (Income Tax) (Investment Allowance) Regulations 2013 [P.U.(A) 120/2013];
(c) has been granted tax exemption under the Petroleum (Income Tax) (Exemption) Order 2013 [P.U.(A) 122/2013];
(d) has been granted accelerated capital allowance under the Petroleum (Income Tax) (Accelerated Capital Allowances) (PETRONAS Marginal Field) Rules 2014 [P.U. (A) 304/2014];
(e) has been granted tax exemption under the Petroleum (Income Tax) (Exemption) Order 2014 [P.U.(A) 305/2014];
(f) has been granted an investment allowance under the Petroleum (Income Tax) (Investment Allowance for PETRONAS) Regulations 2021 [P.U.(A) 336/2021];
(g) carries on petroleum operations in the Joint Development Area; or
(h) carries on petroleum operations in an area under any agreement or arrangement made by the Government with any government of any territory outside Malaysia for the joint exploration and exploitation of petroleum in overlapping areas.

Please refer to the Order for more details

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8. Petroleum (Income Tax) (Adjusted Loss from Oil or Gas Field Decommissioning Activity) (Late-Life Assets Production Sharing Contract) Regulations 2022 [P.U.(A) 303/2022]

P.U.(A) 303/2022 (the Regulations) was gazetted on 27 September 2022 to legislate the proposed tax incentive for LLA project for the upstream petroleum industry as announced in the National Budget 2022. The Regulations which aim to attract oil and gas companies to invest and venture into LLA project are deemed to have come into operation on 1 January 2020.

The Regulations shall apply to a chargeable person who has signed an LLA production sharing contract within the period from 1 January 2020 to 31 December 2029 (both dates inclusive).

Salient points

1. The Minister may determine a project as an LLA project, if such project is operated in a brownfield oil or gas field and has an economic lifespan not exceeding ten years commencing from the year an LLA production sharing contract is signed.

2. To ascertain the assessable income of a chargeable person from his petroleum operation in relation to LLA production sharing contract in a basis period for a YA, a deduction shall be allowed to the chargeable person on any amount of adjusted loss from oil or gas field decommissioning activity.

3. The adjusted loss from oil or gas field decommissioning activity as mentioned above shall be allowed as deduction in ascertaining the assessable income of that chargeable person for a YA immediately preceding the YA where the adjusted loss from oil or gas field decommissioning activity is ascertained under Section 19 of the PITA.

4. Any balance of the adjusted loss from oil or gas field decommissioning activity further to the deduction above, shall be allowed as deduction in ascertaining the assessable income of that chargeable person for the second YA immediately preceding the YA where the adjusted loss from oil or gas field decommissioning activity is ascertained.

5. Any amount of adjusted loss from oil or gas field decommissioning activity which is not utilised thereafter shall be disregarded for the purpose of the PITA.

Relevant definitions

- “Adjusted loss from oil or gas field decommissioning activity” refers to any amount of adjusted loss from oil or gas field decommissioning activity for the basis period for a year of assessment as ascertained under Section 19 of the PITA.

- “Brownfield oil or gas field” refers to an oil or gas field that has been developed and has reached a peak level of oil or gas production rate.

- “Oil or gas field decommissioning activity” refers to removal, leave and abandonment activity of a petroleum facility which is disused or no longer needed for petroleum operations as approved by Petroliam Nasional Berhad, taking into account the international standard specified by a competent organisation and generally accepted.

Please refer to the Regulations for more details.

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Mohd Fariz Mohd Faruk


Subhabrata Dasgupta


Philip Yeoh


Gagan Deep Nagpal

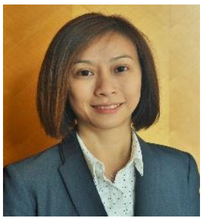

Vrushang Sheth


Tan Wei Chuan


Mark Chan


Toh Hong Peir


Ng Lan Kheng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Suzanna Kavita


Shareena Martin


Michelle Lai


Tan Keat Meng


Chandran TS Ramasamy


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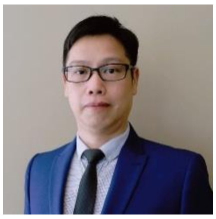
Kei Ooi

Wong Yu Sann



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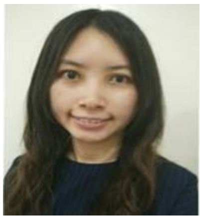

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