Global Employer Services (GES)

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# GES NewsFlash

# Malaysia — Public Ruling No. 11/2012

**January 18, 2013**

**PR No. 11/2012 on "Employee share scheme benefit"**

## Background

The Malaysian Inland Revenue Board (MIRB) issued a new public ruling (PR) on 13 December 2012, i.e., PR No. 11/2012 on "Employee share scheme benefit" to replace PR No. 4/2004 on "Employee share option scheme benefit" (ESOS) issued on 9 December 2004.

## Overview

The objective of this PR is to provide clarification in relation to:

1. Tax treatment in respect of a benefit arising from employee share schemes received by an employee from his employer by reason of his employment;

2. Determination of the amount or value of an employee share scheme benefit that is a perquisite and part of the gross employment income; and

3. Responsibilities of the employer when offering a share scheme and the employee when receiving the benefit from the share scheme.

## Summary of changes

Salient changes are as follows :

**A. Market value of shares**

The definition of market value remains unchanged.

1. Market value of listed company shares

The market value of the shares of companies listed on any stock exchange on the date the right to acquire shares in the company is ascertained by averaging the highest and lowest price of the day. The market value per unit of share is summarized as follows :

$$\text{Market value per share} = \frac{\text{Highest price + lowest price}}{2}$$

2. Market value of unlisted company shares

The market value of unlisted company shares is ascertained by dividing the net asset value of the company by the number of ordinary shares. The net asset value per unit of share is summarized as follows :

$$\text{Net asset value per share} = \frac{\text{Net asset value *}}{\text{Number of ordinary share}}$$

* Net asset value (assets less liabilities) is to be determined only based on the audited accounts of the company, management accounts are not acceptable.

If the share scheme's date of offer, vesting date of offer, vesting date, or date of exercise falls on a non-trading day, the market value of shares traded on the next trading day for that company applies.

In the case where a company has undergone delisting from the stock exchange, the market value of the share on the last trading day of the shares prior to the date of delisting is applicable.

**B. Tax treatment of benefit arising from the share scheme**

The tax treatment has not changed. The PR merely summarizes the options of tax treatment and the trigger point of share benefits.

1. Prior to year of assessment 2006

The taxable benefit arising from a share scheme is the difference between the market value, i.e., share price, and the offer price by the employer on the date the option was awarded. The benefit from the share scheme is triggered on the date of exercise but the assessment relates back to the year of award.

2. With effect from year of assessment 2006

A benefit is derived from a share scheme if :

a) The right to acquire shares in a company exist; and

b) The right is exercised within the relevant period.

The definition of market value has changed to share price on the day the option is exercised or share price on the first day the option is exercisable, whichever is lower.

3. During the transitional period

A concession has been granted to allow the employees to elect between the two (2) tax treatments above if the share options were offered to them before 1 January 2006, provided that the share schemes :

a) Where the offer price has been determined at the time the offer was made to the employee; and

b) That have features of an ESOS, i.e., the dates of offer/exercisable and the last date the option can be exercised are stated in the bylaws of the scheme.

The concession must be made in writing to the employer at the time the option is exercised.

In the event that an employee elect the tax treatments applicable prior to the year of assessment 2006, when the option is exercised six years after the date of offer, the share benefit will be taxed in the year of assessment that began five years before the beginning of the year of assessment in which the option was exercised.

4. Any subsequent changes in share price after share scheme has been exercised due to the following will not influence and affect the taxable employment income :

a) Fluctuations in the value shares

b) Changes in the share price resulting from bonus shares offered based on the shareholding of ordinary shares by the employee; or

c) Gain or loss arising from the disposal of the shares

5. Share benefits of share schemes arising when :

a) Exercised – A share scheme can only be exercised by the employees when the right is vested. The benefit arising from the exercise of that right is taxed as a perquisite.

b) Assigned – The rights acquired under the share scheme to be assigned to a third party may be allowable if there is a provision in the bylaws. The benefit arising from receipt of a consideration for the assignment of his rights acquired under the share scheme will be considered as a taxable perquisite.

c) Released – Under the bylaws of some share schemes, an employee may release their right to acquire shares under a share scheme without exercising that right provided for situations such as those involving a takeover or reconstruction/restructuring or voluntary winding-up of the company. The benefit arising from receipt of a consideration for the release of rights acquired under the share scheme is regarded as a taxable perquisite.

A right to acquire shares of a particular type may be exchanged for a right to acquire shares of another type may occur as a result of a takeover/reconstruction/restructuring of a company. If such an exchange takes place, the case would have to be referred to the Malaysian Inland Revenue Board (MIRB) for examination in order to determine the appropriate basis of assessment.

d) Acquired – An employee acquires the right to a share scheme when their right is vested. The employee exercises their right at the date of acquisition of rights to a share scheme.

C. Responsibility of employee

The obligations of the employee are summarized to reinforce the importance of procedural compliance.

1. Employees are required to make an assessment by including the relevant taxable amounts in relation to the exercise of the share scheme in their personal tax returns (i.e., Form BE, Form B, or Form M) for the year in which the tax charge arises.

2. Employees are also required to ensure that income tax on that benefit is paid:

a) Under the monthly tax deductions (MTD) schemed in the month the option is exercised, it can also be paid in installments over a maximum period of 12 months);

b) Upon furnishing the income tax return form; or

c) By making an arrangement with the MIRB by installment payment in which case the employer is required to comply with the CP38 directives issued by the MIRB.

An election has to be made in writing to the employer at the time the share scheme is exercised in the event that the employee opt to pay the tax on the share benefit by themselves upon furnishing the income tax return form instead of payments via MTD.

D. Responsibility of employer

The name of the form has changed. Submission of documents to the MIRB is no longer required but must be kept for audit purposes.

1. The employer should notify the MIRB within thirty (30) days after the expiry of the period of acceptance of the offer with respect to the launch of the share scheme by completing and submitting the Form BT/MSSP/2012 (Appendix A) to the MIRB's branch that handles the employer's file.

2. The following supporting documents must be kept for audit purposes :

a) Bylaw of the share scheme;

b) Board of Directors' resolution approving the launch of the share scheme;

c) Sample letter of offer stating the offer price and the number of shares offered given to eligible participants;

d) Proof of market value of share based on the market price on the relevant dates, which can be obtained from the newspaper/website showing the trading activity of the share;

e) Audited balance sheet (on exercisable date/exercise date) of the company offering shares and sample share certificate to be issued to the employee are required for an unlisted company on any stock exchange; and

f) Details of employees accepting the offer – Appendix B

3. The following actions are required from the employer where an employee who has been offered a share scheme has exercised his right :

a) Ensure that the benefit arising from the share scheme is deducted from the employee’s salary based on the MTD schedule for the month in which the scheme is exercised;

b) Make the MTD (for a maximum of 12 months) to the MIRB from the salary deduction of employees who opt for the installment payment method commencing from the month in which the scheme is exercised; or

c) Ensure that a written election made by the employee to pay the tax arising on the taxable perquisite themselves upon furnishing the income tax return form at the time the share scheme is exercised. The employer must comply with the Directive of Tax Deduction (CP38), which is issued by the MIRB on the agreement to allow the employee to pay tax on the share benefit by installments.

4. Employers are required to report the share benefit in the employee’s EA form for the year the scheme is exercised. Also, employers are required to submit the details of employees who have exercised their rights to the MIRB’s branch via the Appendix C.

5. The relevant documents must be kept by employers for audit purposes.

**E. Expenses related to newly issued shares**

This is a new section in relation to the deductibility of the expenses of share plans.

1. Newly issued shares of a company

The share issue merely involves a movement in the company’s share capital account when a company fulfills its obligation under an employee share scheme using newly issued shares of its own company.

Pursuant to the Malaysian Income Tax Act of 1967, costs that are wholly and exclusively incurred for the production of gross income (i.e., revenue in nature) qualify for a tax deduction. Although the expense (fair value of the shares) recognized for the said newly issued shares is charged to the profit and loss account as staff cost from the perspective of accounting (MFRS 2: share-based payment), no corporate deductions are allowed as it is not an actual cost wholly and exclusively incurred in generating gross income.

2. Newly issued shares of a holding/subsidiary company

No deductions are allowable for costs related to newly issued shares of its holding/subsidiary company offered by a company to its employees under an employee share scheme.

Examples are provided in the PR to illustrate the factors mentioned above.

**Deloitte's view**

There is now more clarity and guidance from the MIRB on the tax treatment and the determination of the amount of benefit arising from the employee share scheme. This will enable Malaysian employers and employees to understand their responsibilities when offering a share scheme or receiving the benefit arising from the share scheme, and also the requirements to comply as an employer and employee.

## People to contact

If you have any questions concerning the issues in this *GES NewsFlash*, please contact one of the Global Employer Services professionals at our Deloitte offices as follows:


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