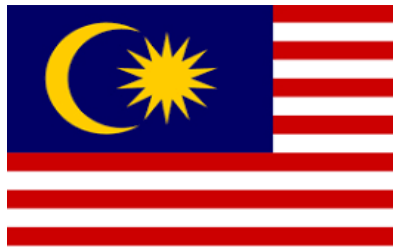


DOING BUSINESS IN MALAYSIA



COMPANY FORMATION IN MALAYSIA

MAIN FORMS OF COMPANY/BUSINESS IN MALAYSIA

The following are the forms of business organization available in Malaysia:

1. Company

Companies are governed by the Companies Act 1965, which provides for four types of companies:

- Company limited by shares;
- Company limited by guarantee;
- Company limited by both shares and guarantee; or
- Unlimited company

In practical terms, almost all companies will be companies limited by shares, i.e., companies with limited liability, the maximum liability of a member being limited to the value of share capital. Companies may be formed as either private companies or public companies.

A private company is one which is prohibited by its articles of association to issue any invitation to the public to subscribe for shares or debentures of the company or to deposit money with the company. Shareholders / members of a private company shall not be more than fifty and are also restricted in their right to transfer their shares in the company. A public company is employed where it is intended to invite the public to subscribe for shares or debentures in the company or to deposit money with the company.

Limited Liability Partnership (LLP) is an alternative business vehicle regulated under the Limited Liability Partnerships Act 2012, which combines the characteristics of a company and a conventional partnership.

LLP is a separate legal entity from its partners. The liabilities of the partners of a LLP are limited while the LLP has unlimited capability in conducting business and holding property.

2. Partnership or Sole Proprietorship

All sole proprietorships and partnerships (excluding LLPs) are unincorporated and must be registered with the Registrar of Businesses also under the purview of the Companies Commission Malaysia. As unincorporated entities, sole proprietorships and partnerships have unlimited liability. In the case of partnerships, partners are both jointly and severally liable for the debts and obligations of the partnerships.

3. Joint Venture

Joint ventures are structured either as partnerships or as incorporated companies; the term “joint venture” does not denote a separate and distinct business entity.

4. A Foreign Company is a company incorporated outside Malaysia and it can carry on business by either:

- incorporating a local company with Companies Commission of Malaysia (CCM); or
- registering the foreign company in Malaysia with CCM

In general, CCM does allow the registration of foreign branches except for establishment involved in the wholesale and retail trade.

5. Representative/Regional Office

The representative regional office does not undertake any commercial activities and only represents its head office/ principal to undertake designated functions. The representative/regional office’s operation is completely funded from sources outside Malaysia.

The representative office/regional office is not required to be incorporated under the Companies Act 1965. The set-up of a representative/ regional office requires the approval of the Malaysian Government.

SPECIFIC TAX CONCERNS RELATED TO ESTABLISHING A COMPANY

Income tax is imposed on income accruing in or derived from Malaysia with the general exception of resident companies carrying on a business of air/sea transport, banking or insurance, which are subject to income tax on a world income scope. (Specific exemptions are available for Malaysian banks, insurance companies and tactful companies subject to specified conditions.)

The principal classes of domestic and foreign taxpayers covered by the income tax legislation are companies, individuals, trade associations, co-operative societies, trusts, and estates. Generally, partnerships are not taxable entities. The partners and not the partnership, are taxed on the partnership income. However, Malaysia has in 2013 introduced a new business vehicle, i.e. the Limited Liability Partnership, which is given the same tax treatment as companies.

Income accruing in or derived from Malaysia is subject to income tax. Foreign income received in Malaysia by a company is not subject to Malaysian income tax. A company is resident in Malaysia for tax purposes if its management and control are exercised in Malaysia. Generally, a company is considered resident in Malaysia if the meetings of its board of directors are held in Malaysia, even if the companies are not incorporated in Malaysia.

The rate of income tax for companies is 24%. However, for a company which is resident in Malaysia, the first RM 500,000 of its chargeable income is taxed at the rate of 19%, provided its issued capital is less than RM 2.5 million. For companies carrying on petroleum operations, the rate of income tax is 38%.

A foreign branch is taxed at the rate of 28% on its income derived from Malaysia. However, interest income is taxed at the rate of 15% except where provided otherwise under the Double Taxation Agreement that Malaysia has with the country concerned.

LEGAL ISSUES RELATED TO ESTABLISHING A COMPANY

All companies need at least two directors and two subscribers, except for wholly owned subsidiaries. A company is also required to appoint a Company Secretary. All companies need a local registered office. It is possible to engage nominees to act as local directors.

CULTURAL CONCERNS RELATED TO ESTABLISHING A COMPANY

There are no specific cultural concerns to be considered when establishing a company in Malaysia.

OTHER COUNTRY-SPECIFIC ISSUES RELATED TO ESTABLISHING A COMPANY

Accounting and Other Records

A foreign company desiring to establish a place of business or to carry on business within Malaysia is required by the Companies Act 1965 to register itself with the Registrar of Companies.

Filing Requirements

A foreign company with operations in Malaysia is required to lodge with the Registrar of Companies within two months of its annual general meeting a certified true copy of its balance sheet and other documents required to be attached to its balance sheet by the law applicable to the company in its place of incorporation or origin.

Financial Statements

The requirement of audited financial statements is similar to those companies incorporated in Malaysia.

DEFINITION OF A PERMANENT ESTABLISHMENT

There is no definition under Malaysian Companies Act, 1965 and Income Tax Act, 1967.

In Double Tax Agreement (DTA) that Malaysia had with the other treaty countries, Permanent Establishment is defined as a fixed place of business through which the business of an enterprise is wholly and partly carried on.

DEFINITION AND MAIN DIFFERENCES BETWEEN A BRANCH AND A SUBSIDIARY

A Branch or “Foreign Company” as defined under Malaysia’s Companies Act 1965 is “a company, corporation, society, association or other body incorporated outside Malaysia”. The Branch does not need to have a Company Secretary. Instead it must appoint an “Agent” under a memorandum of appointment or power of attorney to represent the Branch. The agent must be a person who is residing in Malaysia. He will be authorized to accept on behalf of the Foreign Company all documents such as official notices and court summonses (if any).

A subsidiary on the other hand is a business that is wholly or partially owned by another parent company or holding company.

The main difference between branch and subsidiary is that a branch is not a separate legal entity from the parent company. The branch is the parent company but one that has a legal and physical presence in Malaysia. On the other hand, a subsidiary although owned by the parent is an entirely separate legal entity from the parent company.

Activities conducted by the branch office must be similar to that of the parent company as it is merely an extension, while the subsidiary company is allowed to undertake activities which is different from the parent company.

TAX AND ACCOUNTING OBLIGATIONS

A foreign company in Malaysia will be required to register for corporation tax, good and services tax (GST), payroll taxes and other applicable taxes. For corporation taxes the submission for income tax return is seven month from the company’s financial year end. The GST is payable depending on the company’s yearly turnover either monthly (RM5millions turnover) or quarterly (below RM5millions turnover)

Employer Compliance Obligations

An employer is required to notify the IRBM via Form CP22 of the commencement of employment of its employees in Malaysia within one month of the date of commencement of employment. An employer must declare the total remuneration paid to employees for employment performed in Malaysia on Forms E and EA. This is regardless of whether the employee’s salary and/or allowance are paid in or outside Malaysia.

Accounting Obligation

Financial statements of companies incorporated in Malaysia are required to be kept in a manner that will sufficiently explain its transactions and enable them to be conveniently and properly audited. Under the Companies Act 1965 and the Income Tax Act 1967, transactions of the company must be recorded within sixty days of the date of transactions and the records must be kept in Malaysia and be retained for at least seven years.

In this regard, the financial statements are to be prepared in accordance with “approved accounting standards” issued and adopted by the Malaysian Accounting Standards Board (MASB). Compliance with the approved accounting standards in preparing financial statements pursuant to any laws administered by the CCM, the Securities Commission and the Central Bank of Malaysia, is mandatory and legally enforceable. The MASB, which is established under the Financial Reporting Act 1997, is responsible to develop, issue and adopt accounting standards.

Presently, there are two sets of standards being issued and adopted by the MASB; namely Malaysian Financial Reporting Standards (MFRSs) and Malaysian Private Entity Reporting Standards (MPERSs).

REGISTRATION FORMALITIES

A foreign company may carry on business in Malaysia by either:

- registering a branch office if the investor is a foreign company;
- incorporating a Malaysian company as its subsidiary;

Foreign branch companies must be formally registered with the Companies Commission of Malaysia (CCM) before commencing business in Malaysia. They are allowed to engage in a wide range of businesses in Malaysia except some and in some instances approval must first be obtained from the Domestic Trade Division, Ministry of International Trade and Industry.

STANDARD LEGAL OBLIGATIONS AND FORMALITIES FOR A BRANCH

Companies act 1965 and Registration of Business Act 1956

A branch office of a foreign company can be registered with the CCM provided that the charter, memorandum and articles of association or other instruments constituting or defining the constitution of the foreign company and the laws governing the foreign company in its country of incorporation will not prohibit or restrict the establishment of the branch office in Malaysia. The branch office will be entitled to carry on its business activities according to the objects and powers provided under its constitution.

Income Tax Act 1967

If the authorities grant approval to establish a branch, the profits of the branch are then not subject to Section 108 of the Income Tax Act, 1967, on the repatriation of profits. One or more agents must be appointed and they must be resident in Malaysia. The appointed agent is answerable for the performance of all acts required to be done by the company under the Companies Act, 1965.

HOW TO HIRE MY FIRST EMPLOYEE IN MALAYSIA

MAIN LEGAL STEPS TO FOLLOW TO HIRE A FIRST EMPLOYEE

- Employer needs to register with Employee Provident Fund (EPF) and Social Security Corporation (SOCSO)
- If employee does not have a SOCSO number, they must apply for one from SOCSO
- Employer must comply with the national minimum wage (RM950 per month)
- Employee must be given a written appointment letter
- Employer is responsible for making correct deduction of tax, EPF

Other Employers' Rights and Responsibilities

If the employment period of an employee in a Malaysian company exceeds 1 month, he has to be given a written contract. The minimum requirements of the contract

A contract has to set terms and conditions relating to the weekly or monthly amount of working hours, the probation and termination period, overtime payment and holidays and further details as salary or the exact title of the job. An employer can set own conditions and particulars but they must not fall below the minimum requirements of the Employment Act.

Notice of Termination

The usual period when a notice of termination has to be handed in by either the employer or the employee, depends on the duration of employment. If not stated differently in the contract, the periods according to which the notice of termination is related are:

- employed for less than 2 years (4 weeks notice)
- employed for 2-5 years (6 weeks notice)
- employed for more than 5 years (8 weeks notice)

Probation Period

During the probation period, which is set individually by the employer, the employee can be dismissed without notice. The same applies to termination on the side of the employee. The probation period is usually between 1 and 6 months and the dismissal has to be justified. If a dismissal on the side of the employer is given after this period, and is not due to misconduct of the employee, the latter is entitled to layoff benefits. The basis on which the amount of days paid is calculated, is the same as for the probation period (employed for less than 2 years, from 2-5 years, or for more than 5 years).

CAN SOMEBODY DO BUSINESS FOR ME AND NOT BE AN EMPLOYEE?

Yes, you can hire an agent or sub-contractors.

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