



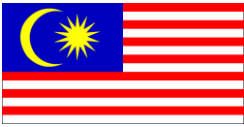
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**ANAD & NORAINI**  
**ESTABLISHING A BUSINESS ENTITY IN MALAYSIA**



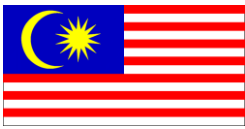
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## ESTABLISHING A BUSINESS ENTITY IN MALAYSIA



### *“Establishing a Business Entity in Malaysia”*

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### **Methods of conducting business in Malaysia**

In Malaysia, business may be conducted in the following manner: -

- (a) by an individual operating as a sole proprietor; or
- (b) by two or more (but not more than 20) persons in partnership; or
- (c) by a limited liability partnership (LLP); or
- (d) by a locally incorporated company or by a foreign company registered under the Companies Act, 2016 (“Act”). A company is a legal entity separate from its members or shareholders. The shareholders cannot be held liable for the debts of a company unless they personally guarantee the debts or loans of the company. According to the Act, a company must be registered with the Companies Commission of Malaysia (“CCM”) to engage in any business activity.

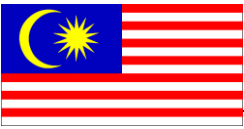
For the purpose of this paper, we will focus on the fourth method of conducting business in Malaysia, i.e. by way of incorporation of a local company or a foreign company. The Act, which replaced the Companies Act, 1965 (the “1965 Act”) has adopted recommendations from the Corporate Law Reform Committee and the Accounting Issues Consultative Committee (both established by the CCM), as well as other regulatory authorities and professional bodies. The new legal framework under the Act aims at

making the corporate vehicle more attractive for businesses by deregulating certain aspects of the corporate processes, reducing the cost of doing business, simplifying compliance provisions, providing flexibility in managing the affairs of companies while enhancing internal control, corporate governance, and corporate responsibility.

Amongst the important changes introduced by the Act include:

- (a) the introduction of a single director and single shareholder company for private companies. In the event office of sole director or last remaining director becomes vacant due to death, disqualification or otherwise vacation of office, the company secretary is responsible to call for a meeting of next of kin or personal representatives for the purposes of appointing new director. If a new director is not appointed within 6 months, the Registrar of Companies may direct to strike the company off the register.
- (b) the replacement of memorandum and articles of association with a constitution, which is optional (save for a company limited by guarantee<sup>1</sup>).
- (c) the optional use of common seal.
- (d) no par or nominal value for new shares issued.
- (e) the removal of the requirement to state authorised share capital.
- (f) the removal of mandatory requirement for private companies to hold annual general meetings.

<sup>1</sup> By virtue of section 31 (1) and 38 (1) of the Act, a company limited by guarantee is mandated to have a constitution.



- (g) private companies may pass a members' resolution by way of written resolution in lieu of meetings. The passing of the resolution need not be unanimous.
- (h) new alternative procedures for the reduction of capital through solvency statements instead of a court order.
- (i) increased sanctions on directors for breaches under the Act, which include heavier fines and longer terms of imprisonment.
- (j) the introduction of two new corporate rescue mechanisms, Corporate Voluntary Arrangement and Judicial Management, to help financially distressed companies remain as a going concern and avoid winding-up.

### **Classification of Companies**

#### **(A) Limited and unlimited companies**

As a separate legal entity, a company's own liability for its debts is never limited and it must pay off all the debts it owes to its creditors. However, the liability of the members in respect to the debts of the company may be limited or unlimited. The question of the members' liability only becomes relevant if the company goes into liquidation and its debts cannot be fully discharged out of its assets.

Under the Act, three (3) types of companies are allowed to be incorporated, namely:

- (a) a company limited by shares;
- (b) a company limited by guarantee; or
- (c) an unlimited company.

A company limited by shares is a company formed on the principle that the member's liability is limited to the amount (if any) unpaid on the shares taken up by them<sup>2</sup>. If the member

has paid in full for his shares, he cannot be asked to pay more, and creditors cannot go after the members' personal assets. This is the most common company structure in Malaysia.

A company limited by guarantee is a company where the liability of the members is limited to such amount as the members undertake to contribute in the event the company is wound up<sup>3</sup>. Companies limited by guarantee are not usually trading companies and they are usually confined in practice to organisations that want the advantages of incorporation without necessarily wanting to engage in business. According to section 45 (1) of the Act, a company limited by guarantee is a company which is formed with any one or all of the following objects: -

- (a) providing recreation or amusement;
- (b) promoting commerce and industry;
- (c) promoting art;
- (d) promoting science;
- (e) promoting religion;
- (f) promoting charity;
- (g) promoting pension or superannuation schemes; or
- (h) promoting any other object useful for the community.

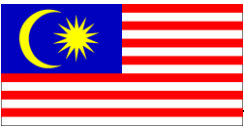
According to section 11 (2) of the Act, a company limited by guarantee shall be a public company.

An unlimited company is a company formed on the principle of having no limit placed on the liability of its members, i.e., the liability of members to contribute to the assets of the company on winding-up is not limited<sup>4</sup>. According to section 11 (3) of the Act, an unlimited company shall either be a private or a public company.

<sup>2</sup> section 10 (2) of the Act.

<sup>3</sup> section 10 (3) of the Act.

<sup>4</sup> section 10 (4) of the Act.

**(B) Public and private companies**

A company with a share capital (whether limited or unlimited) may be incorporated either as a private limited company or a public limited company. Under the Act, a private company is defined as<sup>5</sup>:-

- (a) any company which immediately prior to the commencement of the Act was a private company under the repealed written laws;
- (b) any company incorporated as a private company under the Act; or
- (c) any company converted into a private company pursuant to section 41 of the Act,

being a company, which has not ceased to be a private company under section 42 of the Act.

The requirements of a private company limited by shares are as follows<sup>6</sup>:-

- (i) it shall have not more than 50 shareholders. In determining the number of shareholders in a private company, the joint holders of shares shall be considered as one person and an employee who is a shareholder shall not be counted;
- (ii) it shall restrict the right to transfer its shares;
- (iii) it shall not offer any shares or debentures of the company to the public;
- (iv) it shall not allot or agree to allot any shares or debentures of the company with a view to offering such securities to the public; and
- (v) it shall not invite the public to deposit money with the company for fixed periods

or payable at call, whether bearing interest or otherwise.

A public company is simply defined as a company other than a private company<sup>7</sup>. Apart from the mode of incorporation, a public company may also be formed via the conversion from a private company by passing a special resolution lodged with the CCM by altering its name to include "Sendirian Berhad" or "Sdn. Bhd.". The lodgement shall also include a statement in lieu of prospectus and a statutory declaration verifying that section 190 (2)(b) of the Act has been complied with<sup>8</sup>.

A public company can apply to have its shares quoted on the Bursa Malaysia (stock exchange) subject to compliance with the requirements set out by the exchange. Thereafter, any subsequent issue of securities (by way of rights or bonus or issue arising from an acquisition, etc.) would require the approval of the Securities Commission.

In addition to the above, the other main differences between a private company and a public company are as follows:-

1. the statutory minimum number of resident directors for a private company is one (1) whereas a public company is required to have a minimum of two (2) resident directors;
2. only a private company can pass a written resolution<sup>9</sup>;
3. only a public company is mandated to hold its annual general meeting;
4. certain categories of private companies may be exempted from having its financial statements audited<sup>10</sup>, which allows startups and

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<sup>5</sup> section 2 of the Act.

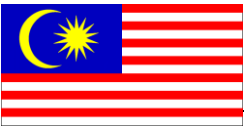
<sup>6</sup> section 42 and 43 (1) of the Act.

<sup>7</sup> section 2 of the Act.

<sup>8</sup> section 41 (2) of the Act.

<sup>9</sup> section 290 of the Act.

<sup>10</sup> section 267(2) of the Act. The qualifying criteria for private companies to be exempted from appointing an



small and medium-sized enterprises to enjoy cost-savings in the running of their business.

### (C) Foreign companies

Foreign companies generally refer to companies incorporated outside Malaysia but set up places of business within Malaysia or carry on businesses in Malaysia. According to the Act, a “foreign company” is defined as<sup>11</sup>:-

- (a) a company, corporation, society, association, or other body incorporated outside Malaysia; or
- (b) an unincorporated society, association, or other body which under the law of its place of origin may sue or be sued or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Malaysia.

In view of the foregoing, whether an entity is a “foreign company” depends essentially on the law of the place of its origin. It is also noteworthy that certain unincorporated associations may be treated as foreign companies under the Malaysian law if they can sue or be sued or hold property. Thus, a partnership registered in England may possibly be considered a foreign company in Malaysia.

A foreign company cannot carry on business in Malaysia unless the company is registered as a foreign company with the Registrar of Companies<sup>12</sup>. The term “carrying on business” includes establishing or using a share transfer or

share registration office or administering, managing, or otherwise dealing with property situated in Malaysia as an agent, legal personal representative, or trustee, whether by servants or agents or otherwise.

### Representative/Regional Offices

In addition to the above, a representative office or a regional office may also be set up by a foreign company / organisation in Malaysia to perform permissible activities for its head office / principal. The major difference between a local company and a representative/regional office is no commercial transaction is allowed for the latter.

The setting up of a representative / regional office would allow foreign-based companies to have a presence in Malaysia for at least three (3) years to explore business opportunities in Malaysia to ascertain if Malaysia is the right place for them to start business. The approval for duration of establishment of representative/regional office will be a minimum of two (2) years, depending on the merits of each case.

A regional office is an office of a foreign company / organisation that serves as the coordination centre for the company’s / organisation’s affiliates, subsidiaries and agents in South-East Asia and the Asia Pacific. The regional office established is responsible for the designated activities of the company / organisation within the region it operates.

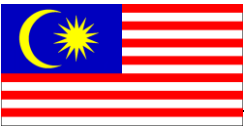
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auditor for a financial year are set out in CCM’s Practice Directive No. 3/2017. The types of private companies that can decide to opt for audit exemption are (i) dormant companies; (ii) zero-revenue companies; and (iii) threshold-qualified companies with annual revenue of not more than RM100,000 during the current financial year and in the immediate past two (2) financial years, total assets of not more than RM300,000 in the immediate past

two (2) financial years and not more than 5 employees at the end of its current financial year and in each of its immediate past two (2) financial years end.

<sup>11</sup> section 2 of the Act.

<sup>12</sup> section 561 (1) of the Act.



The representative office or regional office does not undertake any commercial activities and only represents its head office / principal to undertake designated functions. Although the representative office / regional office is not required to be incorporated under the Act, the setting up of a representative / regional office requires the approval of the Government of Malaysia. However, they are not subject to any equity condition since they do not have issued capital in Malaysia.

The following are the activities which may be performed by the approved representative / regional office for its head office or principal: -

- gathering and analysis of important information or undertaking feasibility studies on investment and business opportunities in Malaysia and the region;
- planning of business activities;
- identifying sources of raw materials, components, or other industrial products;
- undertake research and product development;
- act as a coordination centre for the corporation's affiliates, subsidiaries, and agents in the region; and
- other activities which will not result directly in actual commercial transactions.

An approved representative / regional office may not carry out the following activities: -

- be engaged in any trading (including import and export), business or any form of commercial activity;
- lease warehousing facilities - any shipment / transshipment or storage of goods shall be handled by a local agent or distributor;

- sign business contracts on behalf of the foreign corporation or provide services for a fee;
- participate in the daily management of any of its subsidiaries, affiliates, or branches in Malaysia.

The proposed operational expenditure of the representative / regional office must be at least RM300,000 per annum and must be completely funded from sources outside Malaysia.

#### **Procedure of incorporating a local company**

To incorporate a company, the applicant is required to apply to CCM to confirm the availability of the proposed company name. The application will be approved if the name is not one which may be refused on any ground in section 26 (1) of the Act<sup>13</sup> and the proposed name will be reserved for thirty (30) days from the date of lodgement of the application together with the prescribed fee<sup>14</sup>.

Once the name is approved and reserved, the applicant is required to lodge an application for incorporation to the CCM, which shall include a statement by every person who intends to form a company containing the following particulars<sup>15</sup>:-

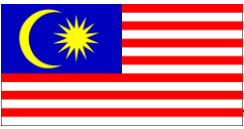
1. the name of the proposed company;
2. the status of whether the company is private or public;
3. the nature of business of the proposed company;
4. the proposed address of the registered office of the proposed company;

<sup>13</sup> The proposed name can be approved if it is not (i) undesirable or unacceptable; (ii) identical to an existing company, corporation, or business; (iii) identical to a name that is being reserved under the Act; or (iv) a name

that the Minister has directed the Registrar of Companies not to accept for registration.

<sup>14</sup> section 27 (5) of the Act.

<sup>15</sup> section 14 (3) of the Act.



5. the name, identification, nationality, and the ordinary place of residence of every person who is to be a member of the company and where any of these persons is a body corporate, the corporate name, place of incorporation, registration number and the registered office of the body corporate;
6. the name, identification, nationality, and the principal place of residence of every person who is to be a director;
7. the name, identification, nationality, and the principal place of residence of the secretary, if any;
8. in the case of a company limited by shares, the details of class and number of shares to be taken by a member;
9. in the case of a company limited by guarantee, the amount up to which the member undertakes to contribute to the assets of the company in the event of its being wound up; and
10. any other information as the Registrar of Company may require.

The said application shall also be accompanied by a statement from each promoter or director confirming<sup>16</sup>:

- (a) his consent to act as a promoter or his appointment as a director, as the case may be; and
- (b) that he is not disqualified under the Act to act as a promoter or a director, as the case may be.

If the Registrar of Company is satisfied that the requirements of the Act have been complied with, the Registrar shall enter the particulars of the company in the register, assign a registration

number to the company and issue a notice of registration in the form and manner as he may determine. The notice of registration is conclusive evidence that the company is duly registered under the Act.

As seen above, the multiple and various types of incorporation documents required under the 1965 Act such as the memorandum and articles of association, statement of compliance and statutory declaration by each promoter and first directors of the proposed company are no longer required and the process of incorporation has been very much simplified under the Act.

A company incorporated under the Act is a body corporate and shall have legal personality separate from that of its members<sup>17</sup>, and shall be capable of exercising all the functions of a body corporate and have the full capacity to carry on or undertake any business or activities, including to sue, and be sued, to acquire, hold or dispose of any property and to do any act which it may do or to enter into transactions<sup>18</sup>.

#### **Requirements of a locally incorporated company**

A locally incorporated company must maintain a registered office in Malaysia where all books and documents required under the Act are kept.

The secretary of the company must be a natural person of full age and a citizen or permanent resident of Malaysia, who shall ordinarily reside in Malaysia by having a principal place of residence in Malaysia. He must be a member of a prescribed body or is licensed by the Registrar of Companies. The company must also appoint an approved company auditor to be the company auditor in Malaysia.

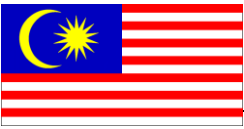
As mentioned earlier, a private company shall have a minimum of one (1) director while a

<sup>16</sup> section 14 (4) of the Act.

<sup>17</sup> section 20 of the Act.

<sup>18</sup> section 21 (1) of the Act.





public company shall have a minimum of two (2) directors<sup>19</sup>. The minimum number of directors excludes alternate or substitute directors and is required to satisfy the following criteria by proving that the director(s):

- (a) is/are ordinarily resident in Malaysia<sup>20</sup>; and
- (b) has/have a principal place of residence in Malaysia.

A director of the company need not necessarily be a shareholder of the company.

A company cannot deal with its own shares or hold shares in its holding company. By virtue of section 123 (1) of the Act, a company cannot give any financial assistance, whether directly or indirectly and whether by means of a loan, guarantee for the purpose of a purchase or subscription by any person of or for any shares in the company, or any shares in its holding company.

#### **Registration procedures in respect of foreign companies**

For the purpose of registration, the foreign company shall provide to CCM the following information<sup>21</sup>:-

- (a) the name, identification, nationality, and the ordinary place of residence of every shareholder in Malaysia and, if any of these persons is a body corporate, the corporate name, place of incorporation or place of origin, registration number and the registered office of the body corporate;
- (b) the name, identification, nationality, and the ordinary place of residence of every

person who is appointed as a director of the foreign company in Malaysia;

- (c) the list of its shareholders or members at its place of origin;
- (d) in the case of a foreign company with share capital, the details of class and number of shares at its place of origin;
- (e) in the case of a foreign company limited without share capital, the amount up to which the member undertakes to contribute to the assets of the foreign company at its place of origin in the event of it being wound up;
- (f) the name and address of a person who is a resident in Malaysia, who is appointed by the foreign company as its agent under a memorandum of appointment or power of attorney; and
- (g) such other information that the CCM may require.

Further, the Act requires an agent of a foreign company to lodge a statement confirming his consent for the appointment<sup>22</sup>.

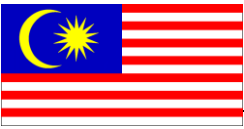
Upon compliance with the requirements under the Act by the lodgement of the prescribed information with the agent's statement of consent to the appointment and the prescribed fee, CCM will register the foreign company and allocate a registration number for the foreign company and issue a notification of registration which shall be conclusive evidence that the requirements as to registration have been complied with. A foreign company shall only be registered under the name as registered in its

<sup>19</sup> section 196 (1) of the Act.

<sup>20</sup> the 1965 Act did not focus on the residency requirement as long as the minimum number of directors has his principal or only place of residence within Malaysia.

<sup>21</sup> section 562 (1) of the Act.

<sup>22</sup> section 562 (2) of the Act.



place of origin subject to the name being available under section 26 of the Act<sup>23</sup>.

Once a foreign company is registered, it shall have the power to hold any immovable property in Malaysia, subject to any written law.

Foreigners are advised to seek further advice from an advocate and solicitor or a practising company secretary for further assistance.

### **Company Tax**

A company, whether resident or not, is assessable on income accrued in or derived from Malaysia. Income derived from sources outside Malaysia and remitted by a resident company is exempted from tax, except in the case of the banking and insurance business, and sea and air transport undertakings, where income is taxable on a world income scope. A company is considered a resident in Malaysia if the control and management of its affairs are exercised in Malaysia.

For the year of assessment (“YA”) 2021, the income tax rate for small and medium-sized enterprise (“SME”) is as follows:-

- 17% on first RM600,000 chargeable income; and
- 24% for any chargeable income in excess of RM600,000.00.

SME refers to a resident company incorporated in Malaysia with an ordinary paid-up share capital of not more than RM2.5 million and gross business income of not more than RM50 million and such company must not be related to

another company with ordinary paid-up share capital of more than RM2.5 million.

For resident companies with paid-up capital more than RM2.5 million at the beginning of the basis period and a non-resident company / branch<sup>24</sup>, the corporate tax rate is 24%.

### **Incentives**

In Malaysia, tax incentives, both direct and indirect, are provided for in the Promotion of Investments Act, 1986, Income Tax Act, 1967, Customs Act, 1967, Sales Tax Act, 1972, Excise Act, 1976 and Free Zones Act, 1990. These statutes cover investments in the manufacturing, agriculture, tourism (including hotel) and approved services sectors as well as research and development, training, and environmental protection activities.

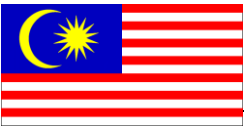
The direct tax incentives grant partial or total relief from income tax payment for a specified period, while indirect tax incentives are in the form of exemptions from import duty, sales tax, and excise duty.

The major tax incentives for companies investing in the services sector are the Pioneer Status and the Investment Tax Allowance.

A company approved with a Pioneer Status certificate can enjoy income tax exemption between 70% - 100% of statutory income for 5 to 10 years, whereas, for Investment Tax Allowance, a company can get allowances between 60% - 100% on qualifying capital expenditure incurred within a period of 5 to 10 years. For projects with a longer gestation period and high capital expenditure, it would be more beneficial to opt for Investment Tax

<sup>23</sup> i.e. it must not be undesirable or unacceptable or identical to an existing company, corporation, or business or identical to a name that is being reserved under the Act or of a name which the Minister has directed the CCM not to accept for registration.

<sup>24</sup> Non-resident companies are liable to Malaysian tax when it carries on a business through a permanent establishment in Malaysia and assessable on income accruing in or derived from Malaysia.



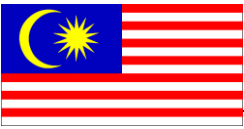
Allowance. Eligibility for Pioneer Status and Investment Tax Allowance is based on certain priorities, including the level of value-added, technology used and industrial linkages. Eligible activities and products are termed as "promoted activities" or "promoted products". For further details, please refer to the website of Malaysian Investment Development Authority at [www.mida.gov.my](http://www.mida.gov.my).

Lastly, as one of the many countries that has been affected by the covid-19 lockdown measures, several tax incentives and short-term economic recovery plans have been introduced to stimulate the nation's economy, which include the following:

- Accelerated capital allowance is given for qualifying capital expenditure incurred on machinery and equipment including Information and Communication Technology Equipment from 1 March 2020 to 31 December 2021 where the annual allowance is increased to 40%;
- Double deduction is given on pre-commencement expenses incurred by International Shipping Companies for setting up regional offices in Malaysia where the application should be made to Malaysian Investment Development Authority not later than 31 December 2021;
- In order to encourage the establishment of new SME, an annual income tax rebate of up to RM20,000 for the first 3 years of assessments is given to an SME which registers and starts its operations from July 1, 2020 until December 31, 2021;
- The existing tax incentives for companies in the manufacturing sector relocating

their operations to Malaysia is revised as follows:-

- The period for applying to the Malaysian Investment Development Authority ("MIDA") for the manufacturing sector is extended by one (1) year to 31 December 2022; and
- The scope of the tax incentives is expanded to companies in selected service sectors, including companies adapting Industrial Revolution 4.0 and digitalisation technology, with investment that contributes to a significant multiplier effect in the following services:-
  - i. Provision of technology solutions, or more typically a technology company which develops technology and provides technology solutions based on substantial scientific or engineering challenges;
  - ii. Provision of infrastructure and technology for cloud computing;
  - iii. Research and development/design and development activities;
  - iv. Medical devices, testing, laboratory and clinical trials; and
  - v. Any services or manufacturing-related



services as determined by the Ministry of Finance.

The tax incentives provided are:

- For a new company:
  - Income tax rate of 0% to 10% for a period of up to 10 years;
- For an existing company with a new services segment:
  - Income tax rate of 10% for a period of up to 10 years.

The period for applying to MIDA for the tax incentives for the services sector is from 7 November 2020 until 31 December 2022.

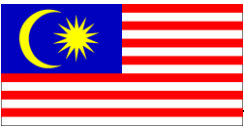
- In order to enhance and simplify the tax incentive for trading activities previously covered under the Principal Hub activities which was subject to higher eligibility criteria, a new incentive scheme known as “Global Trading Centre” has been introduced, whereby a 10% income tax rate for 5 years (which is renewable for another 5 years), is given under this tax incentive. Applications must be received by MIDA between 1 January 2021 and 31 December 2022.
- Manufacturers of pharmaceutical products including vaccines (especially COVID-19 vaccine) will be given the following tax incentives:
  - Income tax rate of 0% up to 10% for the first 10 years; and
  - Income tax rate of 10% for the subsequent period of 10 years.

Further, strategic investments by such companies may be considered for other benefits, including grants, import duty/sales tax exemption for machinery and equipment, as well as raw materials. Applications for this incentive must be received by MIDA between 7 November 2020 and 31 December 2022.

- The following deduction on research and development (“R&D”) expenditure is given to tax resident only:
  - Single deduction under Section 34 (7) of the Income Tax Act (“ITA”);
  - Double deduction under Section 34A of the ITA;
  - Double deduction under Section 34B of the ITA.

The double deduction under Section 34A in respect of R&D expenditure incurred outside Malaysia shall not be more than 30% of the total R&D expenditure for a year of assessment. Where the 30% limit is breached, only a single deduction is given on the R&D expenditure incurred.

- 100% investment tax allowance for 5 years for Malaysian companies to relocate their overseas manufacturing facility in Malaysia with a minimum investment of MYR300 million, which application shall be made from 1 July 2020 to 31 December 2021;
- Special reinvestment allowance (“RA”) is given for qualifying expenditure incurred by companies engaging in manufacturing and selected agriculture activities from YA 2020 to YA 2022, whose RA incentive period has expired;



- Donations / contributions in cash / in-kind to fight against the COVID-19 outbreak are allowed for tax deductions;
- Tax incentives offered by the Malaysian Global Innovation and Creativity Centre on behalf of the government to those contributing towards social enterprises' crowdfunding activities that address social and environmental challenges, where corporate or business donors of a successful Social Impact Matching Grant grantee may receive tax receipts of up to 10% of their aggregate income for cash contributions made between 1 August 2020 and 31 July 2021. Social enterprises are businesses that proactively create a positive social or environmental impact in a financially sustainable manner.

published at theedgemarkets.com on 16 October 2020.

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