Global Guide to Criminalization of Tax Offenses - Malaysia

International Guide on Criminalization of Tax Offenses

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# 1. Please define provide details of criminal tax fraud offence in your jurisdiction

There is no express provision under the Income Tax Act 1967 ("ITA") which provides for criminal liability stemming from a "tax fraud offence". There is also no express definition of "tax fraud" under the ITA. However, the ITA1 provides for an offence of willful evasion, which involves any person who willfully and with intent to evade or assist any other person to evade tax, who:

omits from a return made under the ITA any income which should be included;

makes a false statement or entry in a return made under the ITA;

gives a false answer (orally or in writing) to a question asked or request for information made in pursuance of the ITA;

prepares or maintains or authorizes the preparation or maintenance of false books of account or other false records;

falsifies or authorizes the falsification of books of account or other records; or

makes use or authorizes the use of any fraud, art or contrivance,

Any person guilty of willful evasion shall, on conviction, be liable to a fine of not less than MYR 1,000 and not more than MYR 20,000 or to imprisonment for a tern not exceeding three years or to both, and shall pay a special penalty of treble the amount of tax which has been undercharged.

Furthermore, any person who assists in, or advises with respect to, the preparation of any return where the return results in an understatement of the liability for tax of another person shall, unless he satisfies the court that the assistance or advice was given with reasonable care, be guilty of an offence. He shall, on conviction, be liable to a fine of not less than MYR 2,000 and not more than MYR 20,000 or to imprisonment for a term not exceeding three years or to both.

[1] Section 114 of the ITA

# 2. What are the typical trigger points that could lead to criminal investigations? Can the application of certain tax penalties trigger criminal proceedings?

The ITA does not provide any specific threshold amount for which criminal proceeding for an offense can be instituted. Typical trigger points that could lead to criminal investigations are when there is suspicion that:

the taxpayer had committed a tax offence *i.e.*, non-filing or late filing of returns or filing incorrect returns;

the taxpayer had committed willful evasion or fraud in discharging its statutory obligations under the ITA;

the taxpayer had acted in willful default and deliberately not complied with its statutory obligations under the ITA.

# 3. Can a certain amount of tax adjustment trigger criminal proceedings for tax fraud?

No, there are no mandatory triggers for criminal proceedings arising from tax penalties under the ITA. In Malaysia, penalties come in various forms, none of which necessarily triggers criminal proceedings, but may be imposed **following** a criminal proceeding:

Late payment penalties

When the Inland Revenue Board ("**IRB**") has issued an assessment against the taxpayer and the taxpayer fails to pay the sums assessed within the prescribed timeframe in the assessment, late payment penalties will be imposed.[2] If the late payment penalties remain to be unpaid, the IRB may commence a civil suit against the taxpayer to recover the penalties assessed. However, the ITA does not provide for institution of criminal proceedings against the taxpayer for failure to pay late payment penalties.[3]

Penalties as an alternative to prosecution

For certain offenses, penalty may be imposed if no prosecution is instituted in respect of the alleged offense. For example, where a person makes an incorrect return or gives any incorrect information in relation to any matter affecting his chargeability to tax, the IRB may impose penalties equal to the amount of tax which has been undercharged.[4] If the taxpayer pays that penalty, he shall not be liable to be charged on the same facts with an offense.

Penalties imposed upon conviction in criminal proceedings

Where criminal proceedings have been instituted, certain offenses under the ITA attract a special penalty which corresponds to a percentage of the amount of tax which has been undercharged upon conviction.[5] This special penalty shall be meted out as part of a sentence and recoverable in the same way as fines imposed on conviction.[6]

[2] Section 113(2) of the ITA

[3] Section 125 of the ITA

[4] Section 113(2) of the ITA

[5] Section 112(1A), 113(1) or 114(1) of the ITA

[6] Section 125 of the ITA

# 4. Is criminal intention a requirement, or can mere negligence be the basis of a criminal offence?

Criminal intent is a requirement. The common law standards require both elements of *actus reus* (action) and *mens rea* (criminal intent) to be present to establish a criminal offense. We would caution readers from other jurisdictions to pay attention to the difference in the concept of "negligence" between Malaysia and other countries. Failure to exercise reasonable caution knowing that it may result in mischievous or illegal effects may suffice in establishing *mens rea.* However, in certain tax offenses, the defense of good faith is available to prosecuted taxpayers to disprove a criminal offense.[7]

[7] Section 113(2) of the ITA.

# 5. Does the spontaneous filing of an amended tax return (either through a self-disclosure mechanism or not) have an impact on the initiation of criminal proceedings? Is full payment of tax required?

No. It is important to note that any voluntary disclosure by the taxpayer will not legally preclude the possibility of criminal proceedings by the Public Prosecutor.

In practice, the IRB will verify the accuracy of the amended tax returns filed to ensure that the taxpayer had not made an incorrect return or give any incorrect information affecting his own chargeability to tax. The IRB may issue a notice of additional assessment against the taxpayer for any shortfall of taxes - this is a civil claim, and not a criminal proceeding.

In the unlikely event that the Public Prosecutor institutes criminal proceedings against the taxpayer, if the taxpayer can satisfy the court that the incorrect return or incorrect information was made or given in good faith, the taxpayer shall not be guilty of an offense.[8]

[8] Section 113(1) of the ITA

# 6. Can the prosecutor, on their own initiative, prosecute the tax fraud offence?

Yes. In Malaysia, the Attorney General i.e., the Public Prosecutor has the power to institute, conduct or discontinue any proceedings for an offense.[9] This includes the power the prosecute offenses under written law including offenses committed under the ITA.[10] Under the ITA, the tax fraud offense equivalent is contained in Section 114 of the ITA —  where any person who willfully and with intent to evade or assist any other person to evade tax shall be guilty of an offense.[11]

However, when an offense has been alleged to have been committed under the ITA, the Public Prosecutor has wide discretion to decide whether to institute criminal proceedings against the taxpayer. In other words, prosecution is not mandatory. In practice, criminal proceedings are rarely instituted against taxpayers for offenses alleged to be committed under the ITA.

Instead, the taxing authority for income tax, the IRB, will more commonly issue an assessment against the taxpayer to recover the shortfall in taxes which ought to have been paid by the taxpayer and/or any penalties imposed. Notwithstanding any appeals, in the event the taxpayer fails to pay the sums assessed within the prescribed timeframe in the assessment, the IRB (through the Government of Malaysia) is vested with the powers to commence a civil suit against the taxpayer to recover the sums assessed. The latter is the more commonly exercised route of enforcement.[12]

In addition to this, the IRB by virtue of the Inland Revenue Board of Malaysia Act 1995 may also institute court proceedings on its own accord without first obtaining authorization from the Public Prosecutor. [13]

[9] Article 145(3) of the Federal Constitution

[10] Section 3 of the Criminal Procedure Code

[11] Section 114 of the ITA.

[12] Section 106 of the ITA

[13] Lembaga Hasil Dalam Negeri v Kang Keng Tee & Anor [2011] 4 CLJ 532

# 7. What is the statute of limitation period applicable to the tax offences in your country?

**Issuance of Notice of Assessment / Additional Assessment**

The time limit for the IRB to issue an assessment against the taxpayer is within five years after the expiration of the year of assessment.[14]  In respect of assessments arising from transfer pricing adjustments, the time limit to issue the same is within seven years after the expiration of the year of assessment.[15]

The said time bar does not apply in cases where fraud, willful default or negligence was committed by the taxpayer.[16]

**Criminal proceedings**

For the following offenses under the ITA, no criminal proceedings for an offense shall be instituted more than **12 years** after the offense was committed:[17]

Section 113 of the ITA: Incorrect returns

Section 115 of the ITA: Leaving Malaysia without payment of tax

Section 116 of the ITA: Obstruction of officers

Section 118 of the ITA: Offenses by officials

Section 120 of the ITA: Other offenses

For all other offenses under the ITA not listed above, no limitation period applies (as with all other criminal offenses).

**Civil proceedings**

The IRB (through the Government of Malaysia) is subject to the limitation period of six years to commence a civil suit to recover unpaid taxes and/or penalties against the taxpayer.[18]  The limitation period starts to run from the date the taxes are due and payable i.e., date of assessment.

[14] Section 91(1) of the ITA.

[15] Section 91(5) of the ITA.

[16] Section 91(3) of the ITA.

[17] Section 121 of the ITA.

[18] Section 106(1) of the ITA and Section 6(1)(d) of the Limitation Act 1953.

# 8. When does the statute of limitation period start to run e.g., filing of a tax declaration, failure to pay tax by deadline, tax assessment as a result of a tax audit, etc.?

**Issuance of Notice of Assessment / Additional Assessment (Transfer Pricing Adjustment)**

The five years' limitation period for the IRB to issue an assessment against the taxpayer starts to run after the expiration of the relevant year of assessment.[19]

The seven years' limitation period for the IRB to issue an assessment pursuant to a transfer pricing adjustment against the taxpayer starts to run after the expiration of the relevant year of assessment.[20]

**Criminal proceedings**

For certain offenses which are subject to the limitation period of 12 years under the ITA,[21]  the limitation period starts to run from the date the offense was committed.

**Civil proceedings**

The six years' limitation period for the IRB (through the Government of Malaysia) to commence a civil suit to recover unpaid taxes and/or penalties against the taxpayer starts to run from the date the taxes are due and payable i.e., date of assessment.[22]

[19] Section 91(1) of the ITA.

[20] Section 91(5) of the ITA.

[21]  Section 125 of the ITA.

[22] Section 106(1) of the ITA and Section 6(1)(d) of the Limitation Act 1953.

# 9. What criminal sentences [e.g., custodial, criminal fines or others ] may be incurred in case of a conviction for tax offenses in your jurisdiction?

Pursuant to Section 114 of the ITA, any person who willfully and with intent to evade or assist any other person to evade tax shall be liable to a fine of between MYR 1,000 to MYR 20,000 or the maximum imprisonment of three years or both (and shall pay a special penalty of treble the amount of tax which has been undercharged in consequence of the offense).[23]

[23] Section 114 of the ITA.

# 10. Can having a compliance or risk mitigation program in place mitigate criminal liability for a Company in your jurisdiction?

No. Simply demonstrating that a company has a compliance or risk mitigation program will not eliminate or mitigate criminal liability. Nevertheless, a company's compliance with a risk mitigation program may reduce the *risk* of criminal liability. For instance, a strong tax governance framework within a company which establishes the techniques and processes to identify tax risks, assess risks and actions to mitigate the tax risks may reduce the risk of criminal liability from tax offences.

The IRB introduced the Tax Corporate Governance Framework ("**TCGF**") which is currently in its pilot stage and is intended to be fully implemented in 2024. The TCGF aims is to promote transparency between taxpayers and the IRB by encouraging taxpayers to voluntarily demonstrate that they have sound internal tax risk practices and process. Taxpayers who fulfil the requirement listed by the IRB will be deemed to be qualified for the benefits of the program and will be subjected to lesser scrutiny of their compliance activities.

# 11. Is there a formal or informal program allowing individuals or entities to self-disclose criminal conduct and block prosecution? If not, does such a disclosure mitigate the likelihood of prosecution or reduce the potential sentence and fines?

There is currently no self-disclosure program in Malaysia for income tax.

However, Section 77B of the ITA allows taxpayers to make amendment to the information or assessment in their Return Forms ("**RF**") already submitted within six months after the due date for the furnishing of the return. This can be done by using the Amended Return Form ("**ARF**").

This may mitigate the risk of prosecution from filing incorrect returns under Section 113(2) of the ITA where any person who -

makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than MYR 1,000 and not more than MYR 10,000 and shall pay a special penalty of double the amount of tax which has been undercharged.

In this regard, taxpayers are allowed to make amendments by reporting additional information and amend the assessment in the RF pertaining to:[24]

income under-reported / not reported;

over claimed expenses / other claims over claimed; or

over claimed capital allowances / incentives / reliefs over claimed.

However, no amendment is allowed if the IRB has made additional assessment under Section 91 of the ITA within a period of six months after the date stipulated by ITA for furnishing the Return Form.

Self-amendment by submission of ARF can result in the following changes :

From not liable to issuance of notice of assessment against the taxpayer;

From taxable to issuance of notice of additional assessment against the taxpayer; or

From repayment to issuance of notice of reduced assessment against the taxpayer.

[24] IRB Operational Guideline No. 1 Of The Year 2020: Procedure On Submission Of Amended Return Form

# 12. Once the criminal proceeding has been initiated is there an impact in terms of liability in case of full payment of a tax assessment issued by the tax authorities (first-time offender rule)?

No. The ITA does not provide for any exemption from criminal liability in case of full payment of a tax assessment (regardless of whether the criminal proceeding has been initiated or otherwise). However, the fact that (i) taxes assessed have been fully paid and; (ii) the taxpayer is a first time offender are mitigating factors to reduce the sentence to be imposed on the taxpayer. Nevertheless, where taxes assessed have been fully paid, it remains open for the taxpayer to negotiate for a criminal settlement with the Public Prosecutor before conviction of the offense. It remains the IRB's or the Public Prosecutors' discretion to withdraw criminal proceedings against the accused/offender.

# 13. Does criminal prosecution of a tax offence have an impact on the tax authorities' statute of limitation period?

No. Criminal and civil proceedings are independent of one another and can be instituted at the same time by the Public Prosecutor and IRB (through the Government of Malaysia) respectively. The criminal prosecution of a tax offense will not have an impact on the IRB's statute of limitation to commence a civil suit against taxpayer to recover the unpaid taxes, provided it is still within the stipulated limitation period.

# 14 Can the tax authorities assess and collect underpaid taxes even if the case becomes criminal

Yes. All underpaid taxes are immediately due and payable by the taxpayer to the IRB upon service of the notice of additional assessment. This is notwithstanding that prosecution may or may not be instituted against the taxpayer in respect of a tax offence.

There are, however, provisions in the ITA[25] which provide that the IRB may impose penalty in absence of a prosecution of the accused/offender.

[25] Section 113(1) and Section 113(2) of the ITA

# 15. Is it possible to reach a tax/criminal settlement with the tax authorities/public prosecutor/judge?

In civil proceedings, taxpayers are allowed to negotiate with the IRB for an amenable resolution of the assessment at any stage of proceedings before the Judge delivers his/her decision on the taxpayer's liability. The settlement may be recorded in court and be enforced in the similar manner as any other court order.

In criminal proceedings, it remains open for taxpayers to negotiate for a criminal settlement with the Public Prosecutor at any time before conviction of the offense. A criminal settlement ought to be followed by the Public Prosecutor's withdrawal of charges against the taxpayer.

# 16. Who can be prosecuted: just individuals/directors or also companies?

Both - Corporates and Individuals

The Public Prosecutor may prosecute both individuals and companies, if they are alleged or suspected of committing a tax offense under the ITA.

# 17. Can foreign employees/directors be prosecuted?

Yes. The Public Prosecutor may prosecute foreign employees/directors of a taxpayer company, if they are alleged or suspected of committing a tax offense under the ITA.

# 18. In case of an employee / director being prosecuted in connection with the lack of payment of Company's taxes, is the Company liable for the amounts claimed to such individual?

Sentencing is non-transferable in criminal proceedings in Malaysia. Therefore, each person convicted of a tax offense shall be liable to serve its own sentence meted out by the Courts.

However, in the interest of completeness, for civil claims against companies, the directors of the taxpayer company are jointly and severally liable for the taxpayer's company tax or debt, which is recoverable under a civil suit.[26]

[26] Section 75A of the ITA.

# 19. Have you seen an increase of criminal prosecution for tax offenses over the last five years in your jurisdiction? If so, in relation to what topics?

Whilst there is generally no uptick in criminal prosecution for tax offenses over the last five years in Malaysia, there has been an increase in tax audit and investigation activity against taxpayers in recent years. For example, on 14 June 2022, the IRB said it has traced around 31,598 entities comprising individuals, businesses, companies who have yet to declare their incomes, culminating in tax losses to the IRB estimated at more than MYR 665 million. On 21 April 2023, the IRB stated that it has targeted 100 ultra-high net worth individuals who are possible tax evaders. These developments signal a trend of increasing tax audit and investigation activity, which may consequently increase criminal prosecutions for tax offences in the coming years.

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