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This Edition

Dear reader,

Our best wishes for the new year!

The past three months have seen many tax developments in Southeast Asia, Japan, Korea, China and India. Just to pick a few, China (finally) issued its circular on the conditions for dividend withholding tax deferral if the foreign shareholder(s) reinvest the funds in China. China has now clarified the requirements for claiming the super-deduction for qualifying R&D and it amended its withholding tax rules applicable to foreign investors, especially with respect to shares in Chinese companies.

The Hong Kong IRD has clarified the conditions and application of the recently introduced aircraft leasing tax concessions for lessors and managers, and Hong Kong has now promulgated its membership of the Multilateral Convention on Mutual Administrative Assistance In Tax Matters, which is important especially for its ability to adopt and implement the BEPS provisions in the MLI treaty which it signed back in June last year. India's supreme court issued an important decision on whether outsourcing services constitute a permanent establishment in the country and the Indian tax authorities issued various clarifications including one relating to indirect transfers by foreign investors of shares of Indian companies. Indonesia issued new final tax rules on land and building rental and clarified certain aspects of the debt to equity ratio in the income tax law.

Japan issued tax reform proposals for 2018 and Korea's supreme court issued a decision on permanent establishment issues related to foreign private equity fund investments in Korea. Malaysia issued its budget proposals for 2018 and Malaysia's tax authority made a u-turn on the withholding tax liability on offshore services by issuing an Exemption Order, which bodes well for foreign consultants and engineering companies doing work for Malaysian businesses.

In the Philippines, the senate issued its version of the 2018 tax reform bill. Singapore implemented the possibility for foreign companies to become a Singapore law incorporated company provided certain conditions are satisfied. Taiwan saw many changes, including on controlled foreign companies (CFC) and on transfer pricing obligations. These are just a number of many more topics discussed in this edition of the *Asia Tax Bulletin*.

We trust that you will find this of interest and look forward to hearing from you if you have questions or need assistance with tax matters in Asia.

With kind regards,

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China (PRC)

Deferral of withholding tax on dividends/profits re-invested by foreign investors

On 21 December 2017, the Ministry of Finance (MoF), the State Administration of Taxation (SAT), the National Development and Reform Committee and the Ministry of Commerce (MOFCOM) jointly issued a circular (Cai Shui [2017] No. 88) temporarily exempting from withholding tax dividends and profits distributed to foreign investors and re-invested in China. The circular retroactively applies from 1 January 2017. The main details are summarised below:

- Dividends/profits distributed by resident enterprises to, and re-invested by, foreign investors in China are temporarily exempt from withholding tax, provided that the re-investment is an encouraged foreign investment that meets certain conditions. The exemption is applicable to dividends distributed on or after 1 January 2017; the withholding tax already paid on the distribution of dividends on or after 1 January 2017 may be refunded.
- To be eligible for the exemption, all of the following conditions must be satisfied:
  - o Investments made by using distributed profits must be direct investments. The forms of investment include increasing the capital or capital reserve of the existing resident company, the establishment of a new enterprise, and the acquisition of the shares of a Chinese enterprise from a non-related party; and
  - o Profits must have been actually distributed to investors and recognised as dividends and profits from equity investment for foreign investors; and
  - o The investment (contribution to the capital) must be made directly from the foreign investor’s bank account into the invested enterprise’s bank account in cases where the contribution is made in cash, or directly from the distributing enterprise to the invested enterprise in cases where the contribution is made in kind (assets or securities). Investments made in a diverted way or via other enterprises will be excluded from the exemption; and
  - o The re-investment must fall within the scope of the encouraged categories of “Catalogue for Guidance of Foreign Investment Industries” or “Industrial Catalogue of Foreign Investment in the Middle and Western Regions”.
- The resident enterprise distributing dividends/profits may refrain from withholding the tax after having received and examined the request and supporting documents from foreign investors applying for the exemption. The resident enterprise must file the exemption with the competent tax authority.
- Foreign investors that are entitled to the exemption, but have not used this exemption and paid the withholding tax, may reclaim the taxes within three years from the date of the tax payment.
- With the exception of an approved merger, foreign investors must still pay the withholding tax within seven days in the event of the withdrawal of the investment that has benefited from the exemption, such as a share transfer; share buy-back, or liquidation of a business. In that case, the temporary exemption is a tax deferral.

Income tax exemption for gains on shares traded through Shanghai-Hong Kong stock exchanges

The Ministry of Finance (MoF), the State Administration of Taxation (SAT) and China Securities Regulatory Commission jointly issued a Notice (Cai Shui [2017] No.78) on 1 November 2017, extending the income tax exemption on gains derived by Chinese resident individuals from the transfer of shares in companies listed in the Hong Kong Stock Exchange. The transfer has to be transacted via the interconnection mechanism of the Shanghai-Hong Kong stock exchange (Shanghai-Hong Kong Stock Connect) for the period from 17 November 2017 to 4 December 2019. The exemption that was provided under the previous notice, Cai Shui [2014] No.81, terminated on 16 November 2017.

Tax measures small and low profit enterprises

The Ministry of Finance (MoF) and State Administration of Taxation (SAT) jointly issued Cai Shui [2017] No.76 (the Notice) on 20 October 2017, extending the value added tax (VAT) exemption for small and low profit enterprises. According to the Notice, the current VAT exemption for a small and low profit enterprise with a monthly turnover between CNY 20,000 and CNY 30,000 will be extended to 31 December 2020.

In another joint notice (Cai Shui [2017] No.77), the MoF and the SAT announced that the interest on loans valued at less than CNY 1 million to small and low profit enterprises and sole traders will not be subject to VAT for the period between 1 December 2017 and 31 December 2019. Any loan contracts concluded by financial institutions in respect of loans to small and low profit enterprises will also enjoy a stamp duty exemption for the period between 1 January 2018 and 31 December 2020.

Chinese lecturer at US university taxable

The taxpayer was a citizen of China who entered the United States in 2001 to pursue a Pd.D. degree. In 2006, she completed her studies and obtained a permanent, full-time, nine-month employment year, tenure track position as an assistant professor at a university in the United States. The university renewed her employment contract in 2007, 2008 and 2009. When the taxpayer filed US income tax returns for 2008 and 2009, she claimed exemption from US income tax under article 19 of the treaty.

The issues were:

(1) Whether the taxpayer was a resident of the United States for tax purposes in 2008 and 2009; and
(2) Whether the wages paid to the taxpayer as an assistant professor during 2008 and 2009 were exempt from US income tax under article 19 of the treaty.

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China (PRC) cont'd

The US Tax Court held that the taxpayer was a resident of the United States for tax purposes because she met the substantial presence test under section 7701(b)(1) of the US Internal Revenue Code (IRC). The US Tax Court explained that she was physically present in the United States for more than 183 days in each tax year 2008 and 2009, and that an exception for a teacher holding a J or Q visa (as described in IRC section 7701(b)(3)(D)(i),(5)(A)(ii),(C)) did not apply in the present case because the taxpayer held a H-1B visa instead. The US Tax Court, however, noted in a footnote that, because article 19 of the treaty is excluded from the saving clause in the treaty, which allows the United States to tax its residents, the taxpayer is exempt from US income tax under article 19 of the treaty if she meets the article's requirements.

The US Tax Court held that the wages the taxpayer earned as an assistant professor in 2008 and 2009 were not exempt from US income tax under article 19 of the treaty. The US Tax Court referred to article 19 of the treaty, which provides that a resident of a contracting state who is "temporarily present" in the other contracting state for the purpose of teaching, giving lectures or conducting research is exempt from tax in the other contracting state for a period not exceeding three years with regard to remuneration for teaching, lectures or research.

The US Tax Court determined that the taxpayer was not "temporarily present" in the United States in 2008 and 2009 because no evidence suggests that the taxpayer or the university intended or considered her employment to be temporary and because, in 2007, the taxpayer submitted to the US Citizenship and Immigration Services (USCIS) her application for permanent residency (i.e. a green card), indicating her intent to stay in the United States.

2018 customs duty tariffs

On 12 December 2017, the Customs Tariff Commission of the State Council issued adjustments to the 2018 customs duty tariffs (Shui Wei Hui [2017] No. 27). After the adjustments, the total number of customs items amounts to 8,549. The newly adjusted tariffs applied from 1 January 2018.

According to the adjustments, 948 commodities are subject to tentative most-favoured nation tariffs. However, the application of these tariffs to 27 information technology (IT) products out of 948 commodities is limited to 30 June 2018. Tariffs for the IT products listed in the "Amendments to WTO Tariff Concessions Schedule of the People's Republic of China" will be further reduced from 1 July 2018. Tariffs will also be reduced based on trade or customs agreements with other countries or jurisdictions.

Furthermore, export duty is imposed on 202 items, such as ferrochromium, and there are no changes in tariff quota rates. Included in the publication are tables containing:

- Provisional most-favoured nation tariffs for import products;
- Most-favoured nation tariffs for certain IT products;
- Tariffs for products subject to quota;
- Tariffs for export products;
- Adjustments to import and export tariffs; and
- Tariffs for import products based on international agreements.

Scope of super-deduction for R&D clarified

Further to the implementation rules (Cai Shui [2015] No. 119 and SAT Gong Gao [2015] No. 97) on the super-deduction for research and development (R&D) expenses, the State Administration of Taxation (SAT) issued an announcement concerning the application scope of a super-deduction for R&D activities on 8 November 2017 (SAT Gong Gao [2017] No. 40). The rules contained in the announcement apply to tax year 2017 and subsequent tax years. Compared to Cai Shui [2015] No. 119 and Gong Gao [2015] No. 97, the highlights of the announcement are summarised below:

- Payments made to internal and external staff directly involved in the R&D activities:
  - o Wages and salaries of external staff paid by enterprises through the labour dispatching company (where the employment contract is directly made between the labour dispatching company and the staff) are included in the scope of the super-deduction.
  - o Expenses on equity incentives made to R&D staff are eligible for the super-deduction.
- With respect to costs of materials included in the R&D expenses in prior tax years, the corresponding material costs incurred in the current sales year must be set off against the R&D expenses in the same year. Any excess may be carried forward.
- If tangible or intangible fixed assets used for the R&D activities are depreciated/amortised on an accelerated basis, such depreciation/amortisation expenses calculated in accordance with the tax law may be deemed to be part of the total expenses for the purpose of the super-deduction.
- Other expenses incurred on R&D activities that are eligible for the super-deduction include employee welfare expenses, supplementary pension insurance premiums and supplementary medical insurance premiums.
- Treatment of special situations:
  - o R&D expenses incurred on failed R&D activities are also eligible for the super-deduction.
  - o Expenses incurred by external institutions or individuals to whom R&D activities are assigned are considered to be actual expenses paid to the commissioned party by the commissioning party.
  - o The super-deduction incentive rights enjoyed by the commissioning party will not be allowed to be transferred to the commissioned party.
  - o The commissioned party is required to provide the commissioning party with the statement of actual expenses.

Draft resource tax law

On 20 November 2017, the Ministry of Finance (MoF) and the State Administration of Taxation (SAT) jointly released the draft resource tax law (the draft Law) for public consultation. Comments had to be submitted to the relevant departments before 20 December 2017.

The draft Law does not deviate significantly from the current regulations on resource tax and is a part of the codification programme. Once the draft Law enters into force, it will replace the provisional regulations on resource tax that was issued by the State Council on 25 December 1993.

The draft Law contains 19 articles and amongst others, deals with:

- Both enterprise and individual taxpayers who exploit or produce taxable mineral products;
- Taxable items, which are divided into four main categories (energy mineral products, ferrous mineral products, non-ferrous products and salt products) and a further 146 identified taxable products;
- Tax rates table for taxable products (range from 1% to 27% on the sales price of the products), with exception to some non-ferrous or salt products which could be opted to be taxable at ad valorem;
- Tax incentives; and
- Sino-foreign joint venture oil and gas exploration and exploitation projects will be subject to resource tax instead of a special mineral exploitation fee. Consequently, such Sino-foreign joint ventures will be treated in the same manner as the Chinese enterprises.

Withholding tax rules for non-residents amended

On 17 October 2017, the State Administration of Taxation (SAT) issued an announcement amending and clarifying the withholding tax rules for non-residents (SAT Gong Gao [2017] No. 37). The announcement applied from 1 December 2017. Its principal provisions are summarised below:

- In determining the gains on share transfers, the actual acquisition or purchase price must be taken into account. The price may be adjusted as a result of value fluctuations during the holding period of the shares in accordance with relevant regulations, with the undistributed profits of the acquiree not being allowed to be deducted from the gains.
- In cases where share investments are made or the disposal of shares takes place at multiple stages, the cost of each share transfer must be calculated on the basis of the proportion of the transfer to the total shareholding.
- An example is given:
  - o F is a non-resident enterprise, and C1 and C2 are resident enterprises. F acquired 40% of the shares in C2 in three steps as follows:
    - – CNY 1 million in step 1, CNY 2 million in step 2

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China (PRC) cont'd

and CNY 4 million in step 3. Subsequently, F agreed to sell 30% of its shares in C2 to C1 for CNY 10 million. The total cost of 40% of the shares is CNY 7 million and the proportion of the transfer to the total shares is 75% (30% of 40%). The cost of the transfer of 30% of the shares is CNY 5.25 million (CNY 7 million x 75%). The gains on the transfer amount to CNY 4.75 million (CNY 10 million -/- CNY 5.25 million).

- If the underlying payments are made in foreign currency, the foreign currency must be converted into Chinese Yuan depending on the way in which withholding tax is collected. The withholding tax is primarily collected through a withholding agent designated by the laws or regulations. However, in cases where a withholding agent fails to collect the tax due to various reasons, the non-resident enterprise may make a self-assessment and pay tax to the tax authority, or the tax authority may coerce the non-resident enterprise to pay the tax (for example, through an enterprise in China which owes money to the non-resident enterprise).
- If the tax is withheld by a withholding agent, the foreign currency must be converted at the average exchange rate as at the date of the actual payment or due date of the payment. If the non-resident enterprise files the return and makes the payment itself, the conversion must be made at the average exchange rate as at the date preceding the issuing of the tax payment certificate. If the non-resident is coerced by the tax authority to pay the tax, the date preceding the decision on coercing is the date of conversion. The same rules on the conversion dates apply in calculating the gains of share transfers nominated in foreign currency.
- If it is agreed in a contract that the taxes are borne by the payer, the amount of the payment must be grossed up in determining the amount to be withheld.
- Liability to withholding tax on dividends arises as at the date of the actual payment of dividends (not the date of the decision on distribution as previously provided).
- As regards the payments on the transfer of properties in instalments, the liability to withholding tax only arises at the time the (first) payments exceed the acquisition costs.
- At the place where the income arises, different items of income may fall within the competence of different tax authorities. In principle, the state tax bureau of the place where the property is located is responsible for withholding tax on the gains from the transfer of immovable properties; the competent tax authority of the invested enterprise is responsible for withholding tax on the gains on the equity transfer; the competent tax authority of the distributing enterprise is responsible for withholding tax on dividends; and the competent tax authority of the payer (enterprise or individual) is responsible for withholding taxes on interest, royalties and rental income.
- A withholding tax agent is no longer required to file the contracts which induce payments to non-residents with the tax authorities. Also, a withholding tax agent need not provide the tax authority with an overview of the payments agreed in the contracts, taxes withheld, etc.
- The announcement does not apply to withholding taxes on income from construction projects and services.
- Following the publication of the announcement, the following notices or provisions of announcements ceased to apply from 1 December 2017:
  - Guo Shui Fa [2009] No. 3;
  - Guo Shui Han [2009] No. 698;
  - Paragraph 3 of article 2 of Guo Shui Fa [2009] No. 32;
  - Item 3 of paragraph 2 of article 4 of Guo Shui Fa [2009] No. 85;
  - Article 9 of Guo Shui Fa [2010] No. 119;
  - Article 36 of SAT Gong Gao [2010] No. 4;
  - Articles 5 and 6 of SAT Gong Gao [2011] No. 24;
  - Paragraph 3 of article 2 of SAT Gong Gao [2014] No. 37; and
  - Paragraph 2 of article 8 of SAT Gong Gao [2015] No. 7.
- The announcement also states that provisions of an applicable tax treaty will prevail in case of a conflict between the provisions of the announcement and those of a tax treaty.

Expansion of tax incentive for advanced technology service enterprises nationwide

On 2 November 2017, the Ministry of Finance (MoF), the State Administration of Taxation (SAT), the Ministry of Commerce (MOFCOM), the Ministry of Technology and the Committee of Development jointly issued a Notice (Cai Shui [2017] No.79) expanding the existing tax incentive for advanced technology service enterprises nationwide. The notice retroactively applies from 1 January 2017.

The incentive includes the following:

- Advanced technology service enterprises are subject to enterprise income tax (EIT) at a rate of 15% (the statutory rate being 25%); and
- A deduction applies to employees' education expenditure (up to 8% of the total salary and wages), provided that certain requirements are met.

The services that are eligible for the incentive include:

- Information technology outsourcing (ITO): software development, information technology development services, information systems operation and maintenance;
- Technical business process outsourcing (BPO): business process design services, business operations management, operation services, supply chain management services; and
- Knowledge process outsourcing (KPO): research on intellectual property, research and development and testing of pharmaceutical and biotechnological products, product research and development, industrial design, analytics and data mining, design and development of animation and online games, education development course, engineering design, etc.

Previously, the tax incentive was applicable only to certain designated cities, such as Beijing, Tianjin, Dalian, Harbin, Daqing, Shanghai, Nanjing, Suzhou, Wuxi, Hangzhou, Hefei, Nanchang, Xiamen, Jinan, Wuhan, Changsha, Guangzhou, Shenzhen, Chongqing, Chengdu and Xian.

International tax developments

Luxembourg
On 27 November 2017, China and Luxembourg signed a social security agreement and an administrative arrangement in Beijing.

Cambodia
On 25 October 2017, the Cambodian Cabinet approved the tax treaty with China. The treaty has been submitted to parliament for further approval. (On the same day, the Cambodian Cabinet also approved Cambodia's tax treaties with Brunei and Singapore, respectively.)

JURISDICTION:

Hong Kong

“Most notably, the Special Administrative Region of Hong Kong has been removed from the blacklist.”

Taxation of aircraft leasing

The Hong Kong Inland Revenue Department (HKIRD) issued the Departmental Interpretation and Practice Notes No. 54 (DIPN 54) on taxation of aircraft leasing activities on 27 October 2017. The DIPN 54 sets out the Inland Revenue Department’s interpretation and practice in relation to the relevant provisions under the Inland Revenue (Amendment) (No. 3) Ordinance 2017 which provides profits tax concessions for qualifying aircraft lessors and aircraft leasing managers. The following are the main contents of DIPN 54:

- A qualifying aircraft lessor/manager is entitled to have its qualifying profits taxed at one-half of the corporate profits tax rate. In addition, a qualifying aircraft lessor is eligible for a 20% tax base concession as a compensation for loss of depreciation allowances. According to DIPN 54, to qualify, the aircraft lessor/ manager has to make an irrevocable election in writing and meet the following conditions in that year of assessment:
  - o Its central management and control of the corporation is exercised in Hong Kong;
  - o The activities that produce its qualifying profits in that year are carried out in Hong Kong by the corporation or arranged by the corporation to be carried out in Hong Kong; and
  - o Those activities are not carried out by a permanent establishment outside Hong Kong.
- A corporation is a qualifying aircraft lessor for a year of assessment if, in the basis period for that year of assessment:
  - o It is not an aircraft operator;
  - o It has carried out in Hong Kong one or more qualifying aircraft leasing activities; and
  - o It has not carried out in Hong Kong any activity other than that of a qualifying aircraft leasing activity.
- A corporation is a qualifying aircraft leasing manager for a year of assessment if:
  - o In the basis period for that year of assessment, it is not an aircraft operator; and
  - o For that year of assessment:
    - – It is a dedicated aircraft leasing manager that has satisfied the standalone corporation requirement;
    - – It is an aircraft leasing manager that has satisfied the “1-year safe harbour” rule or the “multiple-year safe harbour” rule though it has carried out in Hong Kong activities other than a qualifying aircraft leasing management activity; or
    - – It is an aircraft leasing manager that has been determined by the Commissioner.
- An anti-tax arbitrage provision is incorporated to prevent tax arbitrage through aircraft leasing transactions between connected persons.

Hong Kong removed from Russian offshore blacklist

On 22 November 2017, the Russian Federal Tax Service (FTS) adopted Order No. MMV-7-17/709 of 1 September 2017 updating the list of low-tax jurisdictions that do not exchange tax information with Russia (blacklist). Most notably, the Special Administrative Region of Hong Kong has been removed from the blacklist.

The blacklist is used for transfer pricing purposes and for the application of the 0% tax rate to dividends paid by a foreign subsidiary to a Russian parent company holding at least 50% of the subsidiary’s equity for at least 365 days. The amendments entered into force on 1 January 2018.

Convention and protocol on Mutual Administrative Assistance in Tax Matters

On 6 October 2017, Hong Kong gazetted the Inland Revenue (Amendment) (No. 5) Bill 2017 (Amendment Bill). The Amendment Bill seeks to pave the way for Hong Kong’s participation in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 protocol, and to align the Inland Revenue Ordinance (IRO) with the Common Reporting Standard (CRS) promulgated by the OECD. The Multilateral Convention will form an important platform for Hong Kong to implement initiatives on international tax co-operation, including the automatic exchange of financial account information in tax matters (AEOI) and combating base erosion and profit shifting (BEPS).

New tax relief for SMEs and R&D to be introduced

On 11 October 2017, the Chief Executive of Hong Kong delivered her maiden Policy Address. According to the Policy Address, new tax measures will be introduced to reduce the burden on small and medium-sized enterprises (SMEs), including a two-tiered profits tax system that would lower the profits tax rate to 8.25% on the first HKD 2 million of profit, and the standard profits tax rate of 16.5% would remain unchanged for profit beyond HKD 2 million. To ensure that the tax benefits will be enjoyed by the SMEs, restrictions will be introduced, such as allowing each group of enterprises to nominate only one enterprise to benefit from the lower tax rate. In addition, the Chief Executive proposed that the first HKD 2 million in eligible research and development (R&D) expenditure will enjoy a 300% tax deduction and 200% deduction for the remainder. A bill to implement the two initiatives will be submitted to the Legislative Council as soon as possible.

JURISDICTION:

Hong Kong cont'd

International tax developments

Belarus
On 30 November 2017, the tax treaty with Belarus entered into force. The agreement generally applies from 1 January 2018 for Belarus and from 1 April 2018 for Hong Kong.

Latvia
On 24 November 2017, Hong Kong's tax treaty with Latvia entered into force. The agreement generally applies from 1 January 2018 for Latvia and from 1 April 2018 for Hong Kong.

Pakistan
On 24 November 2017, Hong Kong's tax treaty with Pakistan entered into force. The agreement generally applies from 1 April 2018 for Hong Kong and from 1 July 2018 for Pakistan.

Switzerland
On 13 October 2017, the Hong Kong - Switzerland Competent Authority Agreement on Automatic Exchange of Information (CRS) (2017) was signed in Hong Kong. The agreement specifies the details of what information will be exchanged and when, as set out in the OECD Automatic Exchange of Information Agreement (2014).

Macao
On 27 October 2017, Hong Kong and Macau signed a Closer Economic Partnership Agreement (CEPA) in Hong Kong. The CEPA entered into force on the date of signature and was effective as of 1 January 2018.

ASEAN
On 12 November 2017, the Association of Southeast Asian Nations (ASEAN) and Hong Kong signed a free trade agreement (FTA) on the sidelines of the 31st ASEAN Summit in Pasay City, the Philippines. On the same day, ASEAN and Hong Kong signed an investment protection agreement.

JURISDICTION:

India

"The indirect transfer provision has been a point of contention among foreign investors since India introduced the 2012 retrospective tax law."

Outsourcing services no Private Equity[1]

The Supreme Court (SC) in a recent judgment in *Assistant Director of Income tax v M/s E-Funds IT Solutions Inc* (2017) 86 Taxmann.com 240 (SC) held that rendition of support services by Indian group company to its parent company in the US would not lead to creation of permanent establishment (Private Equity) of the parent company in India in terms of India-USA Double Taxation Avoidance Agreement (DTAA). Further, since the parent company's personnel by being present in India were not furnishing services to its customers in India, such deputed personnel would not create service PE of the parent company in terms of Article 5(2)(l) of the DTAA.

E-Funds Corporation, USA (E-Funds Corp) and E-Funds IT Solutions Inc, USA (E-Funds Inc) (collectively called as the US Companies) are engaged in the business of ATM management services and electronic payment management. E-Funds International India Private Limited (E-Funds India), group company of the US Companies provide management and marketing support for business activities relating to electronic payments and ATM management services to the latter.

The US Companies had also deputed two of its employees to E-Funds India to work as Senior Director Technical Services and Country Head-Business Development (Seconded Employees) to work under the control and supervision of E-Funds India. Twenty five per cent of the salary component of the Seconded Employees was paid by E-Funds India and the rest by the US Companies which was ultimately reimbursed by E-Funds India. Furthermore, the US Companies and E-Funds India entered into a service agreement (Services Agreement) wherein the employees of E-Funds India were rendering certain marketing services to US Companies, under the supervision and direction of the US Companies. For these services, the US Companies remunerated E-Funds India on an arms' length basis.

During the assessment proceedings of the US Companies, the Indian tax authorities (Tax Authorities) concluded that E-Funds India constituted a PE of the US Companies in India under Article 5 of the DTAA and

[1] Courtesy Khaitan Associates in Mumbai.

India cont'd

held that income attributable to such PE was taxable in India in terms of Article 7 of the DTAA. In relation to the Seconded Employees, the Tax Authorities concluded that the Seconded Employees were not merely providing stewardship activities.

Also, under the Services Agreement, the employees of the E-Funds India US Companies who were providing services to the US Companies were treated as employees of E-Funds India, owing to the de facto control and management of those employees rejecting the argument of the US Companies that their indirect control on the employees of E-Funds India was for protecting its own interest. On appeal, the Income Tax Appellate Tribunal (Tribunal) held that though the Tax Authorities were correct in holding E-Funds India as a PE of the US Companies, it disagreed with the Tax Authorities on the mode of computation and attribution of profits to such PE in India.

The SC confirmed the judgment of the High Court and held that the US Companies do not have any PE in India under the terms of the DTAA.

The SC observed that Tax Authorities have failed to record existence of a fixed place of business in India, which is at the "disposal" of the US Companies through which they carry on their own business. The SC remarked that the Tax Authorities have rather adopted a fundamentally erroneous approach in alleging that the US Companies had a PE in India as they were contracting with a subsidiary. The SC agreed with the observations of the High Court that a mere assignment or sub-contracting to E-Funds India or provision of intangible software for free of cost are not factors determinative of applicability of Article 5(1) of the DTAA.

The SC further referred to a report dated 13 March 2009 of Deloitte Haskins and Sells which was submitted by the US Companies before the Tax Authorities and observed that no part of the main business and revenue earning activity of the US Companies is being carried on through a fixed place of business in India which has been put at their disposal as E-Funds India only renders support services to the US Companies. The SC thus held that the outsourcing of work to India would not give rise to any fixed place PE in India for the US Companies under the DTAA.

The SC noted that Article 5(2)(l) of the DTAA deals with the concept of service PE which essentially has two important limbs:

(a) Furnishing of services within a contracting state by a foreign enterprise; and
(b) Such services being provided through the employees or other personnel of the foreign enterprise for the specified time threshold.

The SC held that provision of services by the US Companies through its Seconded Employees to any customer in India, would create a service PE, whether or not the customer is resident in India. In the instant case, none of the customers of the US Companies had received any services in India. Only auxiliary operations that facilitated such services were carried out in India. This being the case, it was not necessary to refer to the other limb of Article 5(2)(l) i.e. whether employees of E Funds India could be treated as "other personnel" of the US Companies in India, for furnishing any services in India. Therefore, since the necessary condition for provision of services in India was not met, the SC held that the US Companies cannot be said to have a service PE in India. Furthermore, the SC held that even if it is concluded that the US Companies did create a PE in India, as per the principles laid out in *DIT v Morgan Stanley* (2007) 7 SCC 1 if a foreign enterprise compensates a PE at arm's length price then in that case no further profits would be attributable to such PE.

This ruling delivered by the apex court of India has dealt with the finer and practical aspects which are pertinent to the outsourcing sector such as provision of back-end and support services by an Indian group entity, deputation of employees by the offshore entities, quality monitoring by the offshore service recipient entities etc.

Such inbound outsourcing business models have been subjected to scrutiny where the Indian captive unit is generally seen as an extension of the offshore parent entity basis with aspects such as the extent of involvement of the latter by way of quality control, shared software and database and intra-group deputation of employees. The SC ruling lends much-needed clarity on how these business models should be evaluated from the perspective of PE determination. One hopes that this ruling will bring an end to the ongoing litigation in this sector. It should still be considered that the structuring of outsourcing activities is undertaken within the contours as explained in the above ruling to avoid them falling into PE traps.

CBDT issues draft rules for master file and CbC reporting

Further to the introduction of sections 92D and 286 of the Income Tax Act, 1961, the Central Board of Direct Taxes (CBDT) has issued a draft notification dated 6 October 2017 providing for the incorporation of new rules and forms into the Income Tax Rules, 1962 laying down guidelines for maintaining and furnishing transfer pricing documentation in the master file and country-by-country (CbC) report.

The draft rules prescribe, among other things:

- The circumstances in which the master file (Form 3CEBA) must be maintained, the number of years it must be kept and the details required;
- Which entity in the international group is required to furnish the master file;
- The notification and details required to be filed before furnishing the CbC reporting in cases in which the parent entity is not resident in India; and
- The CbC report (Form 3CEBC) and the information required.

Indirect transfers

The CBDT issued a circular on 7 November 2017 clarifying that there should be no Indian income tax liability on an indirect transfer of Indian property or shares if the Indian property or shares concerned have already been subject to Indian income tax. The circular discusses the indirect transfer in the form of offshore share redemptions.

The Indian government has expanded the types of foreign investments exempt from the indirect transfer provision, otherwise known as the Vodafone tax, bringing welcome relief to foreign funds investing through multi-layered structures. India's Central Board of Direct Taxes circular stated that the indirect transfer provision of the Income Tax Act, 1961 –aimed at taxing capital gains arising from indirect transfer of shares deriving substantial value from Indian assets–will not apply to gains on redemption or buyback of shares or interest made by indirect foreign investors using multi-layered structures for investment in specified funds in India.

The clarification applies to non-resident investors making investments into India through multi-layered structures, provided the income of the India-faced fund is chargeable to tax in India – bringing much needed certainty to non-resident investors, according to practitioners.

The indirect transfer provision has been a point of contention among foreign investors since India introduced the 2012 retrospective tax law to undo a Supreme Court order relieving Vodafone of a $2 billion tax bill on capital gains made from an indirect transfer of Indian assets.

MAP and bilateral APA under tax treaties

On 27 November 2017, the Central Board of Direct Taxes (CBDT) clarified its position on the acceptance of applications for a transfer pricing mutual agreement procedure (MAP) and bilateral advance pricing agreement (APA) in cases where the associated enterprise of the Indian entity is resident of a country with which India has concluded a treaty that is effective. In such cases, India will accept the applications, whether or not the treaty contains article 9 (2) of the OECD Model (or the relevant equivalent article) relating to corresponding adjustments.

JURISDICTION:

India cont'd

Clarification on POEM rules for regional headquarters

The concept of "place of effective management" (POEM) for determining the residential status of a company other than an Indian company was introduced effective 1 April 2017. The Central Board of Direct Taxes (CBDT) had previously issued the guiding principles for constitution of a POEM for a company in India through Circular No. 6/2017 of 24 January 2017. Further, Circular No. 8/2017 of 23 February 2017 was issued to clarify the turnover threshold of a company for POEM purposes.

To provide further clarification on POEM, the CBDT issued Circular No. 25/2017 of 23 October 2017.
The salient points are as follows:

- Paragraph 7 of the guiding principles (which was issued under Circular No. 6/2017) states that the POEM of a company engaged in active business outside India is presumed to be outside India if the majority of Board of Directors (the Board) meetings are held outside India. However, if it is established that the Board is standing aside, not exercising its powers and such powers of management are exercised either by the holding company or persons resident in India, then the POEM is considered to be in India.
- The circular clarifies that just because the Board follows global policies in relation to various activities (i.e. payroll, accounting, human resources, information technology functions, networks, supply chain, routine banking and operating procedures) this would not indicate that the Board has stepped aside.
- Further, it has been specified that the establishment of regional headquarters in India where the global policies in relation to various activities are framed and the adhering to such policies by the Board would not by themselves constitute a POEM for subsidiaries and group companies in India.
- The circular specifies that the General Anti-Avoidance Rule may be triggered in case the above is used for aggressive tax planning.

International tax developments

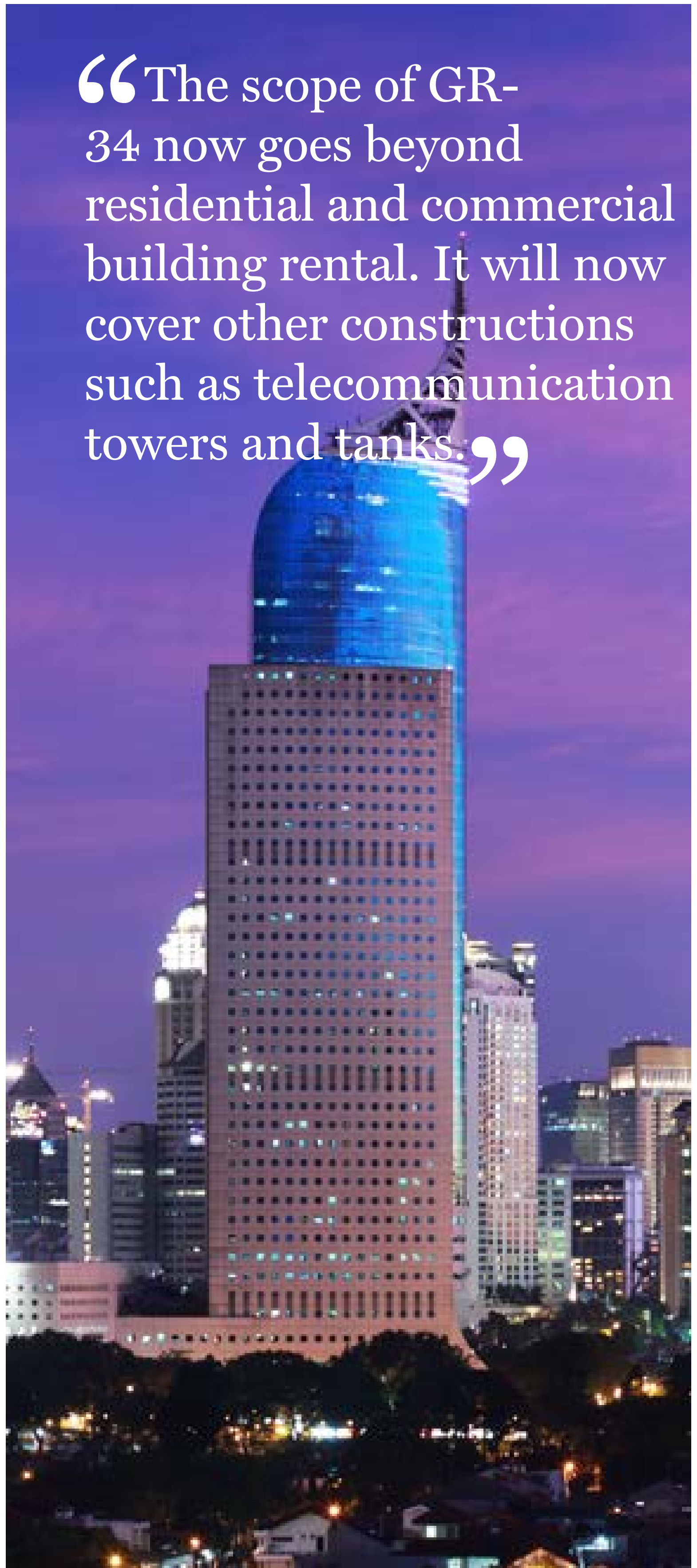
Brazil
On 16 November 2017, Brazil and India signed an administrative arrangement to the already initialled social security agreement between Brazil and India, in New Delhi.

Kenya
On 30 August 2017, the India - Kenya Income Tax Treaty (2016) entered into force. The treaty generally applies from 1 January 2018 for withholding tax matters and 1 January 2017 for other tax matters in Kenya, and from 1 April 2018 for India.

Maldives
The India - Maldives Exchange of Information Agreement entered into force on 1 August 2016. The agreement generally applies from 1 August 2016.

JURISDICTION:

Indonesia



> "The scope of GR-34 now goes beyond residential and commercial building rental. It will now cover other constructions such as telecommunication towers and tanks."

New final tax rules on land and building rental

The Government issued Regulation No.34/2017 (GR-34) on 11 September 2017 that governs income tax on land and/or building rental. GR-34 took effect on 2 January 2018 and revokes the existing GRs dealing with covering this taxation (i.e. GR No.29/1996 (GR-29) as amended by GR No.5/2002). Similar to the previous GRs, gross income from land and/or building rental is subject to Article 4(2) Final Tax at 10%. GR-34 updates some provisions to expand the scope of taxation and provide a more detailed example of income covered under this regulation.

GR-34 defines 'building' as a technical construction that is permanently built or attached on land and/or waters, which is adopted from the definition under the Land and/or Building Tax Law. Therefore, the scope of GR-34 now goes beyond residential and commercial building rental. It will now cover other constructions such as telecommunication towers and tanks.

Income from the rental of these other constructions will be subject to the following income tax treatment:

- Income from ongoing rental for which the rental agreement and rental period had already started prior to 2 January 2018 is subject to 2% Article 23 Withholding Tax (WHT) on asset rental and normal income tax throughout the agreement period. Any addendum made after 2 January 2018 will be subject to GR-34.
- Income from advance payment made prior 2 January 2018 on a rental agreement entered into prior to 2 January 2018 but where the rental period started after 2 January 2018 is subject to 2% Article 23WHT on asset rental and normal income tax. Payment made after 2 January 2018 will be subject to GR-34.
- This final tax is applicable to building rental in full or in part (i.e. an inner or outer part of the building such as terrace, swimming pool, etc).
- Other income deemed as rental income from land and/or building rental under GR-34 now includes all amount paid or payable by tenants by whatever name and in whatever form, including maintenance cost, security

Indonesia cont'd

cost, service charge, and other facilities, whether agreed under a single agreement or in separate agreements.

- Build Operate Transfer ("BOT" or Bangun Guna Serah). GR-34 now covers the income received by land owners from investors in relation to a BOT arrangement. BOT is defined as a co-operation agreement between a land owner and investor, where the land owner will grant rights for the investor to construct building during the agreement period which will then be transferred to the land owner after being operated by the investor or prior to the operation period.
- Taxation of BOT activities is currently regulated under MoF Decree No.248/KMK.04/1995 (KMK-248) and DOT Circular Letter No.SE-38/PJ.4/1995 (SE-38). As GR-34 only regulates taxation on the income received by the land owner, the income of the BOT investor would still follow KMK-248 and SE-38. As a transition, land owner income from ongoing BOT agreements that started prior to 2 January 2018 is subject to the following income tax treatment:
  - o Periodic payment and other income obtained during the agreement period are subject to tax in accordance with KMK-248 and SE-38.
  - o Buildings transferred to the land owner after 2 January 2018 is subject to tax according to GR-34.
- As per previous GRs, income from lodging services is excluded from this taxation. Examples of income under this category of lodging services are student dormitories and employee messes.

Examination of final tax payment on the transfer of land and/or building rights

On 2 November 2017, the DGT issued Regulation No.PER-18/PJ/2017 (PER-18) that governs the examination of the fulfilment of tax obligations in relation to the transfer of land and/or building rights. PER-18 revokes DGT Regulation No.PER-26/PJ/2010 and serves as an implementing regulation of MoF regulations regarding the transfer of land and/or building rights and Real Estate Investment Funds.

Taxpayers that transfer their land and/or building rights or enter into a Sale and Purchase Binding Agreement (Perjanjian Pengikatan Jual Beli) must apply to the tax office for an examination of the Article 4(2) Final Tax paid for the above transaction. The tax office will first conduct a formal examination to check the completeness of the application. An approval letter will be issued within three days if the application satisfies the requirements. A notary can sign the deed of transfer after the issue of this approval letter.

The tax office can conduct a material examination any time after the date of transaction by:

1. Verifying the actual location and size of the property.
2. Verifying the transfer value based on actual proof of payment for transaction between non-related parties.
3. Verifying whether the transfer value is arm's length for transaction between related parties.

Debt to Equity Ratio

Indonesia has set in place a single Debt to Equity Ratio (DER) of 4:1 for tax purposes. This means that the amount of debt allowable in order to obtain full deductibility of the associated financing costs is limited to four times the equity amount (with an exemption for certain taxpayers). This policy was set out in Minister of Finance Regulation No.169/PMK.010/2015 (PMK-169). On 28 November 2017, the Director General of Tax issued Regulation No.PER-25/PJ/2017 (PER-25) which provides certain detail in relation to the implementation of PMK-169.

PMK-169 already excludes from the DER calculation debt used to generate non-taxable income or income subject to final tax. PER-25 now also excludes debt for which the existence cannot be formally verified. This appears to be targeting debt which cannot be substantiated through ordinary commercial arrangements and so with some question over its legitimacy.

PMK-169 already stipulates that deductibility of financing costs derived from related party lending is still subject to the arm's length principle (i.e. as well as satisfaction of the DER). PER-25 further stipulates that financing costs will be deemed to be a dividend if the taxpayer fails to satisfy the arm's length principle. Remittance of the relevant tax (presumably as withholding tax) will be due upon actual payment or the due date of payment.

PMK-169 already stipulates that the following financing costs are not deductible:

a. Financing costs to the extent of being connected to debt which exceeds the DER threshold;
b. Related party financing costs to the extent of any failure to meet the arm's length principle;
c. Financing costs of debt used to generate non-taxable income; and
d. Financing costs of debt used to generate income subject to final tax.

PER-25 now clarifies that these provisions apply even where the taxpayer capitalises the financing costs as part of an asset acquisition (i.e. meaning that the relevant depreciation cannot be deducted).

PER-25 prescribes the following standard forms necessary to report DER compliance: an overall DER calculation and a summary of "offshore" loans. Both forms must be attached to the relevant taxpayer's annual Corporate Income Tax Return (CITR) with the CITR treated as incomplete if the taxpayer fails to do so. Further, and specifically for offshore loans, failure to submit the report will result in the automatic non-deductibility of the relevant financing costs. Both reports are mandatory starting in the 2017 tax year (i.e. for CITRs to be filed by April 2018). There is however no guidance on taxpayers who are excluded from DER such as those involved in infrastructure projects.

Japan

“The government coalition parties presented their 2018 tax reform proposals, which are widely expected to be promulgated in March 2018.”

2018 Tax reform proposals

On 14 December 2017, the government coalition parties presented their 2018 tax reform proposals, which are widely expected to be promulgated in March 2018.

Corporate Tax

- Amend the salary increase tax credit provisions to reward corporations which have increased investment in equipment and training.
- Establish a new IT investment regime to enhance investment in certain kinds of software.
- Disallow R&D credits and other tax benefits for large corporations which do not increase salaries or make other investments in Japan.

International Taxation

- Amending the domestic definition of permanent establishment (“PE”) to align with BEPS Action 7, including (i) expanding the “Dependent Agent PE” definition to include commissionaire structures. At the same time, narrowing the independent agent exception to exclude agents which primarily act on behalf of one or more closely related parties; (ii) limiting “fixed place of business” exclusion for “facilities used solely for the purpose of storage, display, delivery, or certain other activities” only to facilities which have a preparatory or auxiliary function; (iii) providing explicitly that where a tax treaty between Japan and another state has a definition of a PE that is more expansive than domestic law that the definition in the treaty will prevail.
- Make certain technical amendments to clarify changes in the controlled foreign corporation taxation regime as amended in the 2017 Tax Reform. In particular, when shares of a foreign subsidiary are transferred subsequent to an offshore M&A, the capital gain from such transfer would be excluded from the income to be aggregated.
- Provide that a company will be a real estate holding company for the purposes of capital gains taxation on share transfer by a foreign person when more than 50% of the company’s assets consists of real estate in Japan at any time during the 365 days preceding the transfer of company shares.

Corporate reorganisations

- Defer taxation for shareholders of an acquired company under certain conditions when treasury shares are used in a tender offer bid (government approval will be required).
- Amend conditions regarding whether a corporate spin off is a tax qualified reorganisation.
- Amend and clarify (i) the conditions for reorganisations without consideration to be tax qualified and (ii) the tax consequences of non-qualified reorganisations.

Tax administration procedures

a. Require large corporations to file their corporate, consumption, and local tax returns electronically from fiscal years beginning on or after 1 April 2020.

Miscellaneous

b. Amend tax accounting provisions to align the tax code with IFRS revenue recognition rules and abolish provisions for return allowances and the deferral treatment for long-term instalment sales (after a transition period).

Individual income tax proposals

c. Decrease the earned income deduction for employees by 100,000 yen and reduce the income level deduction cap to 1.95 million yen (the reduced deduction cap will not apply to taxpayers with children age 22 or younger or those taking a special disability exemption).
d. Increase the personal exemption by 100,000 yen but phase out all personal exemptions at income levels between 24 million and 25 million yen.
e. Decrease the public pension income deduction by 100,000 yen and cap the deduction at 1.95 million yen for seniors whose annual pension income exceeds 10 million yen. Also, reduce the public pension deduction for seniors with “other income” over 10 million yen.
f. Decrease the “blue form” tax return deduction by 100,000 yen and increase the “blue form” deduction by 100,000 yen for filing and maintaining tax returns and accounting documents electronically.

Inheritance and gift taxation

- Repeal of the “5-year tail” rule for inheritance and gift tax for “long-term foreigners” departing Japan with a certain claw-back provision for foreigners who return to Japan within two years of departure.
- Introduce rules to reduce inheritance and gift tax problems related to business succession.

International tax developments

Israel

On 5 October 2017, the investment protection agreement (IPA) between Israel and Japan, signed on 1 February 2017, entered into force.

JURISDICTION:

Korea

> "There is a change in relation to the tax bracket for the increase in the top marginal rate for corporate income tax."

Foreign private equity fund's permanent establishment

On 12 October 2017, the Supreme Court of Korea handed down an important decision dealing with permanent establishment (PE) issues relating to foreign private equity funds with Korean investments. The foreign private equity funds in this case (the Funds) made equity investments into several Korean companies through special purpose companies established in Belgium (SPCs). The Belgium - Korea Income Tax Treaty provides for capital gains tax exemption. The Funds were formed in the form of a limited partnership in the United States and Bermuda with a general partner (GP) that had an unlimited liability partner (Company A) and limited liability partners. Company A, through an ownership chain, established wholly owned subsidiaries in Korea (Korean Subs 1 and 2), which provided origination services and asset management services, respectively, with respect to the Funds' Korean investments.

The PE issues arose as some of the limited liability partners of the GP (the Officers at Issue) were appointed as the representative director or officers of the Korean Subs and performed the above-mentioned origination services and asset management services in Korea. The Korean tax authorities assessed taxes on the Korean source income of the Funds at the domestic tax rate arguing that the Funds had a PE in Korea because the Officers at Issue performed essential and significant activities of a typical private equity fund at a fixed place of business in Korea. In addition, the Korean tax authorities made an argument that a dependent agent PE also existed because the Officers at Issue and/or Korean Subs were dependent agents who habitually exercised authority to conclude contracts on behalf of the Funds.

The Supreme Court held that a PE is found when either an employee of a foreign entity or a person who is directed by the foreign entity performs essential and significant business activities (going beyond preparatory or auxiliary activities) at a fixed place of business, such as a building or facility in Korea which is at the disposal of the foreign entity. The Supreme Court, reconfirming the legal principle that all relevant facts and circumstances, including the nature and magnitude of business activities in Korea, their relative significance and role in the overall business activities, should be considered in determining whether such business activities constitute essential and significant business activities, affirmed the lower courts' decision that no Korean PE of the Funds existed.

Regarding the issue of fixed place PE, the Supreme Court found that:

- Decisions on all significant matters, such as fundraising, acquisition of targets, divesture of investments, were made abroad;
- The activities of the Officers at Issue were not performed on behalf of the Funds, but the Officers at Issue functioned as officers of the Korean Subs, both of which were legal persons separate from the Funds; and
- The activities of the Officers at Issue related to the acquisition and management of the target companies were ex-ante and preparatory activities for making investment decisions or were ex-post and auxiliary activities to assist the management of assets and the determination of the timing of divestment, especially in view of the purposes of the Korean Subs.

Regarding the issue of dependent agent PE, the Supreme Court found that:

- Even if the Officers at Issue participated in negotiations and signed agreements in the process of acquisition of a target company, such activities were conducted in their capacity as officers of the Korean Subs, i.e. legal entities separate from the Funds, and therefore not as agents of the Funds; and
- There was no evidence proving that the Officers at Issue had otherwise habitually exercised the authority to conclude contracts on behalf of the Funds.
- This decision provides important guidelines for determining the existence of a PE of foreign private equity funds in Korea. In short, when a foreign private equity fund establishes a domestic company to search for potential investments or to manage the fund's investment portfolio, the fund would not be considered to have a PE in Korea simply because there is a Korean company providing services to the fund. In determining whether the fund conducts essential and significant business activities in Korea, the following factors should be considered:
  - o Whether all important decisions on "fundraising, acquisitions, and divestments" are made overseas; and
  - o Whether the activities of the officers of the Korean service company are limited to:
  - o Services specified in a service contract between the company and the fund;
  - o Ex-ante and preparatory activities to make investment decisions; and
  - o Ex-post and auxiliary activities to assist management of assets and determination of the timing of divestments.

2018 tax proposals

On 5 December 2017, the National Assembly of Korea passed the 2018 tax bills reported in the previous edition of this newsletter. Most of the tax proposals were passed without modifications. However, there is a change in relation to the tax bracket for the increase in the top marginal rate for corporate income tax. The threshold of the new highest corporate income tax rate of 25% has been increased from "in excess of KRW 200 billion" (as proposed earlier on 2 August 2017 to "in excess of KRW 300 billion". Several other tax proposals under the Presidential Decrees are still pending and will most likely be announced and passed in late January or early February 2018.

JURISDICTION:

Korea cont'd

International tax developments

USA
On 22 June 2017, the Korea (Rep). - United States Competent Authority Arrangement on the Exchange of Country-By-Country (CbC) Reports (2017), which was signed on the same date, entered into force. The arrangement generally applies from 22 June 2017.

Vanuatu
On 8 June 2017, the Korea (Rep.) - Vanuatu Exchange of Information Agreement (2012) entered into force. The agreement generally applies from 8 June 2017 for criminal tax matters and from 1 January 2018 for other tax matters. News of the agreement entering into force was published on 29 November 2017 by the Korean government.

JURISDICTION:

Malaysia

> "The Fees would be subject to Malaysian withholding tax if the Fees are deemed to be derived from Malaysia."

Offshore services not subject to withholding tax

The Income Tax (Exemption) (No. 9) Order 2017 ("**Exemption Order**") was published in the Federal Gazette on 24 October 2017. The Exemption Order exempts a non-resident from the payment of income tax in respect of certain categories of income derived from Malaysia under certain circumstances, and stipulates that the 10% withholding tax obligations under the Malaysian Income Tax Act 1967 ("**Act**") will not be applicable to the exempted income.

It relates to:

(i) Amounts paid in consideration of services rendered by a person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such person; and
(ii) Amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme.

(collectively referred to as "**Fees**").

The Fees would be subject to Malaysian withholding tax if the Fees are deemed to be derived from Malaysia. Prior to 17 January 2017, the derivation rules set out in Section 15A of the Act provided that the Fees shall be deemed to be derived from Malaysia if (i) responsibility for the payment lies with the government, a state government, a local authority, or a person who is resident in Malaysia; or (ii) the payment is charged as an outgoing payment or expense in the accounts of a business carried on in Malaysia, provided that the amount is attributable to services which are performed in Malaysia.

However, with effect from 17 January 2017, the deemed derivation rules were amended by deleting the proviso. This had serious implications for suppliers of cross border services – the Fees paid by a Malaysian resident to a non-resident supplier would be deemed to be

JURISDICTION:

Malaysia cont'd

derived from Malaysia even if the services were wholly performed by the non-resident supplier outside Malaysia, resulting in the imposition of Malaysian withholding tax under Section 109B of the Act.

The Exemption Order provides that a non-resident shall be exempted from the payment of income tax on the Fees if the services are performed by the non-resident outside Malaysia. Please note that the Exemption Order does not change the deemed derivation rules. In other words, the Fees will continue to be regarded as Malaysian-sourced income under Section 15A of the Act, but will be exempted from withholding tax if the services are performed outside Malaysia.

The Exemption Order is deemed to come into operation on 6 September 2017. From a timing perspective, this means that the Malaysian payor would not be required to deduct and remit the withholding tax in respect of any Fees that is paid or credited to a non-resident service provider from 6 September 2017 onwards. However, the Exemption Order does not apply to the period from 17 January 2017 to 5 September 2017, and therefore, the withholding tax provisions under Section 109B would continue to apply within that period even if the services were performed outside Malaysia (subject to any relief under an applicable double tax agreement).

On 7 December 2017, the Inland Revenue Board of Malaysia (IRBM) published Practice Note 3/2017 clarifying the effective date of the Income Tax (Exemption) (No.9) Order 2017 (exemption from withholding tax, with effect from 6 September 2017, for services performed outside Malaysia).

- For contracts signed and performed outside Malaysia after 6 September 2017, payments made to non-residents are not subject to withholding tax;
- For contracts signed before 6 September 2017, withholding tax is only applicable to any offshore services performed between 1 February 2017 and 5 September 2017, regardless of whether payment was made to the non-resident before or after 6 September 2017; and
- If a payment to a non-resident was made before 6 September 2017 under a contract signed before 6 September 2017, but the services were performed after 6 September 2017, the payments are not subject to withholding tax. Any withholding tax paid will be refunded.

GST public ruling on gifts

On 1 December 2017, the Royal Malaysian Customs Department (RMCD) issued Public Ruling (PR) 03/2017 on Gift Rules. The ruling aims to provide clarification on the chargeability of goods and services tax (GST) on gifts made by taxable persons.

- No GST will be charged for the provision of goods to the same recipient within a year that cost MYR 500 or less;
- Gifts to employees or clients that cost more than MYR 500 are subject to GST;
- For gifts with no proof of purchase, the value of the gifts will be determined based on the open market value; and
- Industrial or commercial samples of goods are not subject to GST, provided that the goods are marked "not for sale" or "sample" or carry any other sign that conveys the same meaning and the package of the sample is smaller than the retail good, or they are machine replicas which may have the same limited functions as the actual retail specification.

GST public ruling on issuance and holding of securities

On 12 December 2017, the Royal Malaysian Customs Department (RMCD) issued Public Ruling (PR) 04/2017 on Issuance and Holding of Securities. The ruling aims to provide clarification on the goods and services tax (GST) treatment of the issuance and holding of securities.

- The issuance of shares and any other financial instruments or securities other than a unit trust by a taxable person for the purpose of raising capital is not considered a supply;
- Holding of shares for investment purposes is not considered a supply;
- Holding of debt securities (e.g. bonds) is treated as an exempt supply; and
- Input tax on the cost of issuance of shares, debt securities for the purpose of raising capital and share/debt buyback is claimable; however, input tax on the cost attributed to the holding of bonds, debentures, notes and similar financial instruments is not claimable.

Budget for 2018

On 27 October 2017, the Prime Minister presented Budget 2018. The key proposals are listed below:

Corporate taxation

- For expenditures incurred on the purchase of Information and Communication Technology equipment and software, the following proposals were made:

Qualifying expenditure	Capital allowance rates	Effective year
Purchase of computer hardware and software	**Initial allowance: 20%; annual allowance: 20%**	**YA 2017**
Expenditure incurred on development of customised software (i.e. consultation fee, licensing fee and incidental fees related to software development)	**Initial allowance: 20%; annual allowance: 20%**	**YA 2018**

- In order to prevent excessive interest claims on loans made between related companies and to comply with transfer pricing guidelines, it is proposed that thin capitalisation rules be replaced by earning stripping rules that were introduced by the OECD).
- Other incentives include:
  - o Tax exemption on the Green Sustainable and Responsible Investments Sukuk Grant;
  - o Tax exemption on management fee income for sustainable and responsible investment funds;
  - o Tax incentives for transformation to industry 4.0;
  - o An extension of tax incentives for a principal hub;
  - o The expansion of tax incentives for hiring disabled workers;
  - o An extension of the period for the application of incentives for new four and five-star hotels, tour operating companies and medical tourism; and
  - o An expansion of scope for the double deduction incentive for expenses incurred in obtaining certification for quality systems and standards.

Personal taxation

- The individual income tax rate for residents will be reduced by 2% for chargeable income between RM 20,000 and RM 70,000 for the Year of Assessment (YA) as follows:

Chargeable income	Current tax rate (%)	Proposed tax rate for YA 2018 (%)
20,001 – 35,000	**5**	**3**
35,001 – 50,000	**10**	**8**
50,001 – 70,000	**16**	**14**

- A tax exemption of 50% for YA 2018 to 2020 will be given on rental income received by Malaysian Resident individuals provided that the monthly rental does not exceed RM 2000.
- Tax relief of up to RM 6000 for amounts deposited in the National Education Savings Scheme (SSPN) will be extended from YA 2018 to YA 2020;
- Other proposals include:
  - o An extension period for tax incentives for Angel investors; and
  - o Tax incentives for women returning to work after a career break of two years.

Goods and services tax (GST)

- Effective from 1 January 2018, reading materials such as magazines, journals, periodicals and comics will be zero-rated.
- All supplies made by the local authorities will no longer be subject to GST and will be treated as out-of-scope supply. The effective date is stipulated either on 1 April 2018 or 1 October 2018 as opted by the local authorities.
- Other proposals include:
- An extension period for stamp duty exemption to revive abandoned housing projects;
- Stamp duty exemption for trading of exchange traded funds and Structural Warrants;

JURISDICTION:

Malaysia cont'd

- GST exemption for management and maintenance services of stratified residential buildings;
- GST relief on construction services for school buildings and places of worship;
- GST relief on importation of big ticket items;
- Importation of goods under lease agreement from designated areas; and
- Relief of GST on handling services rendered to operators of cruise ships.

Sharing of information between the tax and the customs authority

On 16 November 2017, the Inland Revenue Board of Malaysia (IRBM) and the Royal Malaysian Customs Department (RMCD) jointly issued a media release stating that they have signed a Memorandum of Understanding (MoU) on the sharing of information nationwide. The objective of the information sharing is to improve operational effectiveness between the two government agencies by obtaining information of taxpayers from each other. The sharing of information programme is formed under the National Blue Ocean Strategy co-operation that is in line with the Government Transformation Plan.

Disposal of plant or machinery other than controlled sales

On 12 December 2017, the Inland Revenue Board of Malaysia (IRBM) issued Public Ruling (PR) No. 7/2017 – Disposal of Plant or Machinery Part 1 – Other than Controlled Sales. The PR provides clarification of the tax treatment of the disposal of plant and machinery by a person (a company, body of persons, limited liability partnership and corporation sole) that is not a controlled sale.

- Where a person disposes of plant or machinery on which capital allowance was previously claimed, a balancing charge or balancing allowance may arise. In computing the balancing charge/allowance, the disposal value is determined by the market value of the asset or net proceeds of the asset. However, if the asset was disposed of to the government, state government or local authority, the general rule of using market value will not apply;
- With effect from year of assessment 2016, where a significant part of an asset (e.g. the engine of a plane, a pump and generator that are part of a large machine, etc.) is replaced with a new part and depreciated separately, the old part is deemed to have been disposed of;
- Where a person disposes of an asset within two years of purchase, the Director General has the discretion to withdraw any capital allowance that has been made on the asset and impose a balancing charge on the disposed asset; and
- An asset is written off due to being obsolete or damaged beyond repair and could not be sold, the market value of such an asset is considered to be zero.

JURISDICTION:

Philippines

> "Self-employed persons and/or professionals have the option to be taxed either as compensation earners or at 8% of their gross sales or receipts."

Senate files tax reform bill

On 20 September 2017, the Senate Committee on Ways and Means issued its version of the tax reform bill, Senate Bill 1592, distinguishing it from House Bill 5636 that was passed by the House of Representatives in May 2017. The differences between Senate Bill 1592 and House Bill 5636 will be harmonised in a bicameral conference committee before being transmitted to the President's office for signing into law. Key aspects of Senate Bill 1592 are the following:

Personal income tax

- Individuals earning less than PHP 150,000 are exempted from tax for years of assessment 2018 to 2020.
- The top rate for chargeable income of over PHP 2 million is set at 32%.
- Self-employed persons and/or professionals have the option to be taxed either as compensation earners or at 8% of their gross sales or receipts.
- Winnings from Philippines Charity Sweepstakes Office, lotto and interest income from depository banks under the expanded foreign currency deposit system are subject to 20% final tax.
- Cash and/or property dividend received from a domestic corporation is subject to 20% final tax.
- The income tax exemption for the 13th month pay and benefits is maintained at a cap of PHP 82,000.
- The personal exemption of PHP 50,000 is removed.

Value added tax

The VAT exemption for the following items/individuals/sectors will be retained:

- Raw food;
- Healthcare;
- Social housing;
- Business process outsourcing;
- Persons with disabilities;
- Senior citizens; and
- Co-operatives.

The VAT threshold is increased from PHP 1,919,500 to PHP 5 million.

JURISDICTION:

Philippines cont'd

Other taxes

- Buses, trucks, cargo vans, jeepneys, single cab chassis vehicles, special purpose vehicles, and vehicles purely powered by electricity or hybrid vehicles are not subject to excise tax.
- Excise tax from PHP 3 to PHP 10 per litre of volume capacity is imposed on sweetened beverages.

Government Securities Repurchase Transactions

On 10 November 2017, the Philippines Bureau of Internal Revenue (BIR) issued Revenue Memorandum Circular No. 95-2017 providing guidelines on the tax treatment of government securities repurchase programmes (GS Repo Programs) governed by a global master repurchase agreement.

The circular provides the following points:

- GS Repo Programs are exempted from Documentary Stamp Tax;
- The repo rate (i.e. difference between the original price and the repurchase price) and other interest income are subject to final withholding tax of 20%; and
- Mark to market gains and other realised gains from the subsequent sale of Repo securities within the Repo period are subject to 30% corporate income tax.

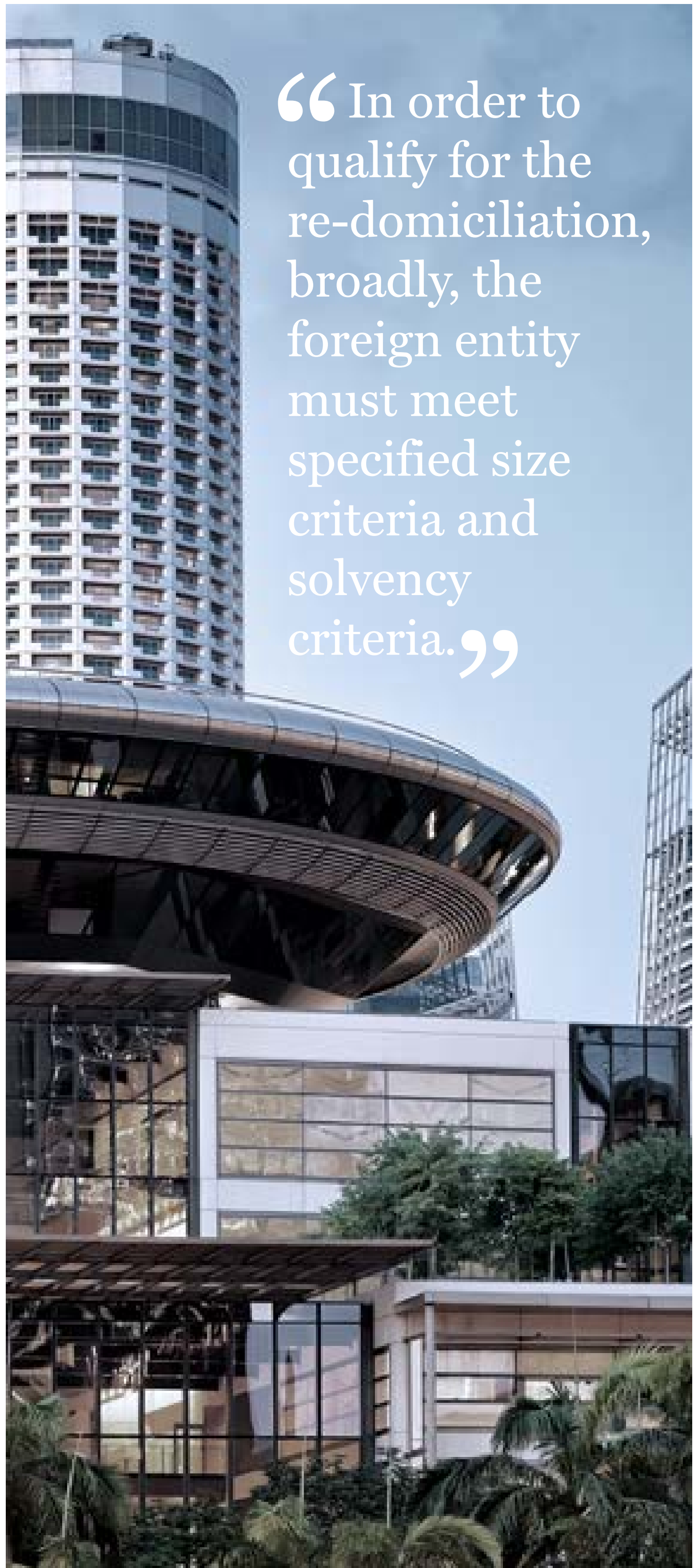
The circular provides other details such as Repo transaction requirements, the registration and reporting requirements for Government Eligible Securities Dealers.

International tax developments

Portugal
On 1 October 2017, the Philippines - Portugal Social Security Agreement (2012) entered into force. The agreement generally applies from 1 October 2017.

JURISDICTION:

Singapore



"In order to qualify for the re-domiciliation, broadly, the foreign entity must meet specified size criteria and solvency criteria."

Inward re-domiciliation regime takes effect

Singapore's business registry ACRA announced that the inward re-domiciliation regime has taken effect from 11 October 2017. This legal opportunity was introduced under recent amendments of the Companies Act and enables foreign corporate entities to transfer their registration to Singapore. A qualifying foreign corporate entity that re-domiciles to Singapore will become a Singapore company and will be required to comply with the Companies Act like any other Singapore incorporated entity.

Becoming a Singapore incorporated company may facilitate its wish to successfully negotiate a tax incentive with the Singapore government provided it satisfies the substantive conditions for the tax incentive. Also, it may be helpful to obtain a confirmation from the Singapore tax authority that the company is a tax resident of Singapore provided the management and control of its business is carried out in Singapore. Being a tax resident is a condition in order to benefit from Singapore's double tax treaties and to qualify for certain tax exemptions (e.g. foreign dividend tax exemption).

In order to qualify for the re-domiciliation, broadly, the foreign entity must meet specified size criteria and solvency criteria, it must be allowed to transfer its incorporation under the law of its place of incorporation and it must have complied with the requirements under that law. Further, it must be done in good faith, it must not be done to defraud existing creditors and the company must not be under judicial management or in liquidation.

Transfer pricing

Parliament passed on 18 October 2017 the tax changes proposed in the 2017 Budget Statement. In addition, the tax changes, announced in February of 2017, contain new provisions with respect to transfer pricing, a tax framework applicable to foreign companies who qualified for inward re-domiciliation (and have thus become Singapore law incorporated companies), the

Singapore cont'd

introduction of Financial Reporting Standard 109 in the tax law as a mandatory provision and a new provision to provide for adjustments to the amount of statutory or exempt income arising from the adoption of Financial Reporting Standard 115.

Transfer Pricing
With effect from financial year ending 2018, there is a statutory requirement to maintain mandatory contemporaneous transfer pricing documentation for businesses with turnover exceeding S$ 10 million. Detailed rules are still expected setting out exceptions to the documentation requirement. It is expected that the various exceptions currently provided for in the TP Guidelines will be included in the rules. The penalty for non-compliance with the documentation requirement is S$ 10,000 (was S$ 1,000). The general TP provision in the law, s.34D, has been completely rewritten and now allows the IRAS to adjust the TP if either the commercial or financial relations between related companies deviate from what unrelated parties would have entered into or where unrelated parties would not have entered into any commercial or financial relations. The IRAS has been granted powers to disregard the form if the substance of the transaction is different from the form.

Interestingly, the new provision contains an automatic 5% surcharge (penalty) on any TP adjustment made by IRAS (with effect from financial year ending 2018) unless IRAS waives the surcharge. The surcharge is a cash outlay regardless of whether the taxpayer is in a tax loss situation. It will be helpful to see how the IRAS will apply the surcharge policy. Another change is that the new provision now stipulates that any adjustment made by the IRAS will be treated as accruing or derived or received in Singapore, so any offshore sourced income adjusted under the TP provision will be treated as taxable income with respect to the adjustment.

Inward
Redomiciliation tax framework: it contains provisions dealing with bad debts and impairment losses, expenses, trading stock, capital allowances for assets and writing down allowances for IP. The tax exemption scheme for start-ups will not apply to redomiciled companies. However, they will be eligible for a tax credit if the emigrating jurisdiction imposes a tax on unrealised profits upon exiting that country's jurisdiction, provided that Singapore taxes those profits.

Avoidance of Double Taxation Agreements

On 11 October 2017, the Inland Revenue Authority of Singapore (IRAS) published an e-Tax Guide on double taxation agreements (DTAs). The e-Tax Guide provides guidance on:

- The interpretation and application of Singapore's DTAs; and
- The mutual agreement procedure (MAP) under Singapore's DTAs.

The e-Tax Guide provides guidance to taxpayers on the purpose of DTAs, and how to interpret and apply provisions that are commonly found in Singapore's DTAs. It also provides practical guidance to taxpayers on how to access DTA benefits, and avoid or resolve DTA-related disputes under a MAP, with a guide on minimum information required when filing a MAP application.

The e-Tax Guide also includes a section on the Multilateral Convention to Implement the Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), which was signed by Singapore on 7 June 2017. It explains the implications of the MLI on Singapore's DTAs. The DTAs that will be amended by the MLI are listed on the IRAS website, and the specific textual changes that will be made to these DTAs will be provided through subsidiary legislation made under the Income Tax Act and will also be published on the IRAS website.

De-registration by Singapore branches of foreign companies

Pursuant to section 377(1) of the Companies Act, a Singapore branch of a foreign company that has ceased to have a place of business or to carry on business in Singapore is required to lodge a notice with the Accounting and Corporate Regulatory Authority (ACRA) within seven days. The Inland Revenue Authority of Singapore (IRAS) recently revised its web page to state that it must be informed by the branch in writing at the same time as ACRA, with the aim of settling the tax matters and tax liabilities of the branch. The written notification to IRAS will include:

- The subject heading "Cessation of Business in Singapore";
- The date of cessation of business in Singapore;
- The name and contact details of a person with whom IRAS can liaise on tax matters; and
- All outstanding income tax returns (Form C), financial statements and tax computations made up to the last day of business.
- In general, IRAS attempts to complete all assessments within one month of receipt of the complete information. Nevertheless, it may take up to six months to review the assessments if IRAS requires further information from branches with complex affairs or that have submitted incomplete information.

Goods and Services Tax changes

On 2 October 2017, the Goods and Services Tax (Amendment) Bill 2017 was passed. The changes include the following:

- Extending customer accounting to the movable assets of furnished non-residential property for GST-registered Real Estate Investment Trusts (REITs) and their Special Purpose Vehicles (SPVs);
- Providing the basis to implement an "opt-out" approach for digitised tax notices;
- Allowing GST treatment to be based on the approved use of the land, instead of the approved use of the building, for government land sold with existing buildings set to be demolished;
- Extending customer accounting to prescribed supplies commonly used in fraud schemes;
- Electronic record-keeping requirements and additional requirements for invoice details for selected businesses; and
- A monthly penalty of SGD 200 for the late submission of GST returns to commence immediately after the filing due date.

Possible tax on e-commerce to diversify tax base

The Senior Minister of State (Finance and Law) was recently quoted as stating that e-commerce would be an area enabling Singapore to further diversify its tax base. Her comments followed those of the Prime Minister who had signalled that Singapore needs to prepare for tax increases to fund increasing government expenditure, particularly as the population ages. While the government would not rush into implementing such a tax, it is also an area that cannot be put off. Currently, online shoppers in Singapore are not taxed if the order is SGD 400 or less.

Income Tax changes

On 2 October 2017, the Income Tax (Amendment) Bill 2017 was passed. The amendments to the Income Tax Act include tax changes announced in the 2017 Budget. They also include an introduction to transfer pricing documentation requirements and other refinements to existing tax policies and tax administration.

Medisave contributions
With effect from 1 January 2018, the maximum amount that an employer can contribute to his employee's Medisave account (not treated as income of the employee) under the Additional Medisave Contribution Scheme will be raised from SGD 1,500 to SGD 2,730 per year. Accordingly, the maximum deduction allowable to the employer for these contributions is also increased to the same amount.

With effect from 1 January 2018, the maximum tax exemption that a self-employed person can receive on contributions to his Medisave account by an eligible company that he works with will be increased from SGD 1,500 to SGD 2,730 per year. The maximum deduction allowable to the eligible company for its contribution to the self-employed person's Medisave account will be also increased to SGD 2,730 per year.

JURISDICTION:

Singapore cont'd

Transfer pricing
Where an action is taken by the tax authority to increase a person's income or to reduce a person's deduction or loss, a surcharge of 5% of the amount increased or reduced is recoverable from the person as a debt due to the government beginning from the year of assessment 2019. The surcharge must be paid within one month starting from the date a written notice of the surcharge is served on the person.

A mandatory transfer pricing documentation requirement is effective from the year of assessment 2019. However, it is only applicable to businesses with gross revenue exceeding SGD 10 million and significant related party transactions. The transfer pricing documentation must be prepared no later than the due date for filing the tax return and must contain the details required in the rules.

A relevant business must prepare and keep the transfer pricing documentation for at least five years from the end of the basis period in which the transaction took place. Additionally, the same business must furnish any transfer pricing documentation to the tax authority within 30 days from the date of request (without false or misleading information). Otherwise, the business will be guilty of an offence and will be liable on conviction to a fine not exceeding SGD 10,000.

Avoidance of double taxation arrangements
An amendment is made to empower the Minister of Finance to implement Singapore's obligation under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument), signed on 7 June 2017.

International tax compliance agreements
The Minister of Finance may by order declare a competent authority agreement or Country-by-Country Reporting (CbCR) exchange agreement between the competent authority of Singapore and the corresponding competent authority of another country as an international tax compliance agreement, and not just a competent authority agreement or CbCR exchange agreement between governments.

The Minister of Finance may also declare any other agreement or arrangement between the competent authority of Singapore and the corresponding competent authority of another country (not just between governments) that makes provisions that are corresponding or substantially similar to any agreement above as an international tax compliance agreement.

An order declaring an agreement or arrangement as an international tax compliance agreement takes effect only on or after that agreement or arrangement enters into force for Singapore. Where an order covers more than one agreement or arrangement, then the order does not take effect on or after a single date, but takes effect for each agreement or arrangement on or after the date that it has entered into force for Singapore. This is intended to enable Singapore to make a single order to cover agreements or arrangements with different countries or competent authorities, e.g. the multilateral agreement on exchange of country-by-country reports which enters into force between Singapore and different signatories on different dates.

Property Tax

On 2 October 2017, the Property Tax (Amendment) Bill 2017 was passed. The proposed measures reported on 9 May 2017 were largely adopted as amendments to the Property Tax Act. However, the Ministry of Finance will further study the exemption of machinery from property tax. Thus, the clarification stating that machinery used for providing the setting/controlled environment for business and industrial processes or for storage of goods is to be assessed for property tax, together with the land or building on which it has been affixed, is not included. The changes include the following:

- The basis for implementing an "opt-out" approach for digitised property tax notices (effective from the date of publication in the *Official Gazette*); and
- Clarification and enhancement on the information gathering powers of the Comptroller of Property Tax, the Chief Assessor and the officers authorised by either of them on their behalf.

Work permits

Recently, the Ministry of Manpower introduced changes to the online Employment Pass application without providing prior notice. In line with the Fair Consideration Framework, which aims to build a Singaporean work core to be supplemented by foreign expertise, the new changes, which include requesting information about an employer's specific recruitment practices, will enable the Ministry of Manpower and the Tripartite Alliance for Fair and Progressive Employment Practices to assess efforts made by local employers to open available jobs to Singaporeans and to consider local talent before resorting to foreign talent.

The information collected will be used by the government to better understand the profile of the local workforce, identify the nature of the jobs that are in demand, and identify skills gaps in the local workforce that need to be addressed. Going forward, human resources professionals must be prepared to implement procedures to manage, track, and document job applications received, interviews conducted, and the reasons for hiring a foreign candidate rather than a local worker in order to use the Employment Pass application.

IRAS XML schema user guide for CRS returns published

The Inland Revenue Authority of Singapore (IRAS) recently published the user guide for Common Reporting Standard (CRS) returns. Reporting Singaporean financial institutions are required to submit CRS returns setting out all information relating to every reportable account that they hold in accordance with the OECD's CRS XML Schema v1.0 (XML schema).

The user guide took effect from 13 October 2017. It explains the information to be included in each data element to be reported in the XML schema and provides guidance on how to make corrections of data items within a file that can be processed automatically. The user guide contains the following information:

- XML file preparation and submission;
- Schema information (i.e. message header, individual account holder or controlling person details, entity account holder details and identifying information of the reporting financial institution); and
- Guidance on correction of data, including correction examples.

International tax developments

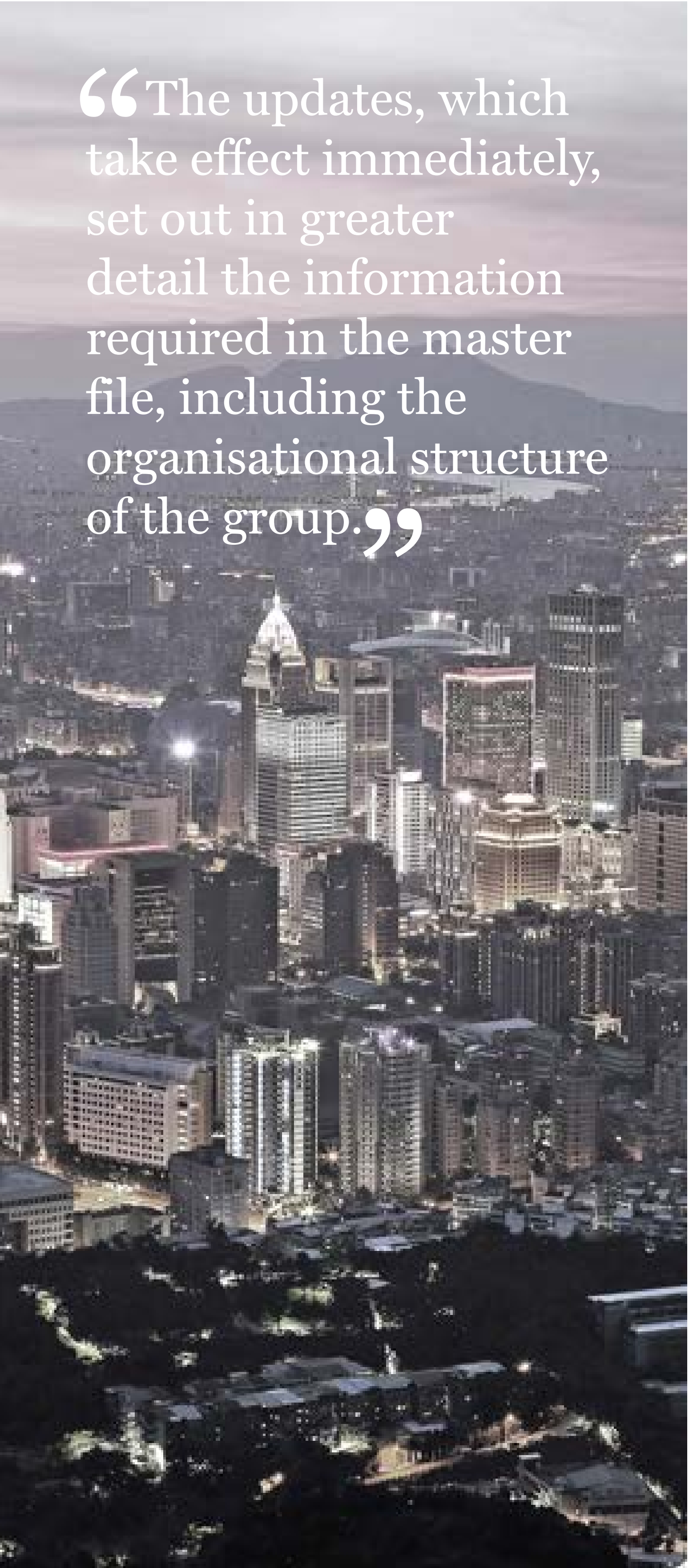
On 2 October 2017, the Singaporean Parliament passed Bill No. 36/2017 to ratify the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). Reference is made to the previous editions of this bulletin in which we discussed the MLI. This step serves to incorporate the MLI provisions into domestic tax legislation.

Australia
On 1 December 2017, the amending protocol, signed on 13 October 2016, to the 2003 free trade agreement (FTA) between Australia and Singapore entered into force.

Cambodia
The tax treaty between Singapore and Cambodia entered into force on 29 December 2017.

JURISDICTION:

Taiwan



Transfer Pricing and reporting

New orders released by Taiwan's Ministry of Finance update the country's transfer pricing documentation rules to reflect recent OECD implementation guidance and set specific rules for controlled foreign companies owned by individual shareholders. The MOF's November 14 order on transfer pricing documentation says Taiwan should follow other countries in conforming its rules to guidance issued after the country first adopted the master file, local file, and country-by-country reporting requirements set out in the OECD's final report on action 13 of the base erosion and profit-shifting project. Since the OECD released the final action 13 report in 2015, it has issued a series of implementation guidance updates — most recently in July — that address specific accounting questions and surrogate filing rules. It also issued guidance on appropriate use and handbooks on risk assessment and implementation in October.

The rules state that Taiwan will recognise CbC reports filed by a surrogate parent entity. They also include the action 13 report's optional local filing rules, which require local subsidiaries to file a CbC report if the group's ultimate parent is resident in a jurisdiction that either does not require or does not effectively exchange CbC reports. Taiwan first adopted the OECD's recommended transfer pricing documentation rules in December 2016 and amended them in March. The updates, which take effect immediately, set out in greater detail the information required in the master file, including the organisational structure of the group.

CFC

On 20 September 2017, the Ministry of Finance (MoF) published the CFC implementation rules. The rules contain nine articles to be enacted by the MoF. The main content of the rules is summarised below:

- A foreign company located in a low-tax country or region is defined as a controlled foreign company (CFC) if a profit-making enterprise and its associated person directly or indirectly hold more than 50% of the shares or capital of, or if the profit-making enterprise has significant influence over, that foreign company.
- A low-tax country or region refers to a jurisdiction with a statutory tax rate which is lower than 70% of the statutory corporate tax rate of Taiwan (i.e. lower than 11.9% as the corporate tax rate of Taiwan is 17%). If a jurisdiction adopts a special tax rate or regime for special regions or industries, the calculation of the tax rate must be made on the basis of that special rate or regime. Moreover, a jurisdiction that exempts foreign-sourced income (territorial system) or only taxes foreign income on a remittance basis is also considered to be a low-tax jurisdiction. The MoF will publish a list of low-tax countries or regions.
- CFC rules do not apply to CFCs that are engaged in genuine business activities, or CFCs whose investment income, including dividends, interest, royalties, rental income or capital gains, accounts for less than 10% of total business income. Royalties received for intellectual property developed through research and development (R&D) activities carried on in the low-tax jurisdiction are excluded from the calculation of the 10% threshold, as is rental income from the tangible properties constructed or manufactured in that low-tax jurisdiction.
- The fact that genuine business activities are carried on implies the existence of a fixed place of business and employment of employees. Business income of a bank, security company, commodity company or insurance company licensed by relevant authorities is not considered to be passive investment income in the calculation of the 10% threshold. Furthermore, a profit-making enterprise is exempt from CFC rules if the annual profit of its CFC is less than TW 7,000,000. However, if the aggregate annual business profits of all of its CFCs in a specific low-tax country or region exceed TW 7,000,000, the CFC rules will apply.
- The passive income of a CFC that is, according to CFC rules, attributed to the profit-making enterprise and included in the taxable income for a specific tax year, is not included in the taxable dividends or profits distributed by a CFC.
- Foreign corporate taxes on distributed CFC income may be credited within five years from the year in which the income is attributed. Tax will be refunded in situations where tax overpayment has been made.
- If a taxpayer has CFCs, it is required to provide information such as the taxpayer's and its associated person's organisational structure, the percentage of shares or capital of the CFCs, financial reports of the CFCs, a chart of loss offsets of CFCs for the past 10 years, the distribution of investment income by CFCs, etc. The documents must be verified by the relevant authorities or Taiwan diplomatic posts.

CRS

Taiwan is implementing the OECD's common reporting standard in 2019 as part of efforts to jointly tackle global tax evasion with other countries. The Ministry of Finance announced Nov. 16 the regulations implementing the OECD's Common Reporting Standard (CRS). The rules relate to, among other things, the scope of information exchange, and the standards for due diligence procedures and reporting obligations.

Under the rules, Taiwan will implement the first exchange of information with other jurisdictions in 2020. Taiwan Deputy Finance Minister Jain-Rong Su said that Taiwan has worked hard to align its tax rules with global trends of transparency.

Taiwan's amendment to its Tax Collection rules in June provides a legal basis to implement the global standard on the Automatic Exchange of Information (AEOI), including financial account information in tax matters. Under the revision, financial institutions and government authorities have the right to collect and dispatch certain information without being obliged to comply with personal data protection requirements provided under other laws.

Financial institutions in Taiwan should complete the first stage of the due diligence procedures by Dec. 31, 2019. It targets new accounts and pre-existing high-value individual accounts with balances over $1 million as of Dec. 31, 2018, or any subsequent year. The second stage of due diligence procedures should be completed by Dec. 31, 2020. It targets pre-existing lower-value individual accounts with balances below $1 million as of Dec. 31, 2018, as well as entity accounts with balance over $250,000. Tax practitioners said financial institutions would certainly need more details because the implementation rules have not been released yet.

JURISDICTION:

Taiwan cont'd

Tax changes passed by parliament

Further to the tax reform announced on 1 September 2017, it was reported on 12 October 2017 on the website of the Ministry of Finance (MoF), that the proposed amendments were passed by the parliament, the Executive Yuan. Additionally, the MoF has announced that it will actively communicate with all parties in the Legislative Yuan so as to speed up the legislative process of these amendments.

JURISDICTION:

Thailand

Visa Applications

Among a recent spate of technological advancements, the Thai Department of Employment, Ministry of Labor, Board of Investment, and Immigration Bureau are launching a new Single Window for Visa and Work Permits system for foreign experts. The new system is intended to reduce the time spent and documentation required to obtain a work permit. Currently, foreigners must use the One Stop Service Center to apply for a work permit and visa. This involves the foreigner first obtaining an approval letter from the Board of Investment. Once that's obtained, they apply for a work permit through the Department of Employment. Once that's approved, they receive a hard copy work permit book. Upon its receipt, they then apply for a one-year visa with the Immigration Bureau.

Once the Single Window system is available, the applicant will simply file one application online. The system will allow the applicant to schedule an appointment with the Immigration Bureau and will provide a downloadable e-Permit to replace the paper work permit book. It was anticipated the Single Window system would be fully functional by January 1, 2018. In preparation for the launch of the new system, the Board of Investment is offering training to participating companies. This new system will streamline, simplify, and improve the application process for obtaining initial and renewal work permits and visas.

Increase in social security contributions

The Thailand Social Security Office announced that with effect from 1 January 2018, the maximum social security contribution for employees and employers will be increased from THB 750 per month to THB 1,000 per month.

Personal tax deduction

On 10 November 2017, Ministerial Regulation No. 333 was gazetted. It allows resident individuals to claim an allowance of not more than THB 15,000 for

JURISDICTION:

Thailand cont'd

purchases made during the period from 11 November 2017 to 3 December 2017. The purchases must be used or consumed in Thailand, and the claim has to be supported by tax invoices. However, the allowance does not apply to purchases of alcoholic drinks, tobacco, cars, motorcycles, boats, oil or petrol for vehicles, tour services and hotel accommodation.

Corporate tax deduction

On 31 October 2017, Royal Decree No. 647 was gazetted. It allows small and medium-sized enterprises (SMEs) to claim a double deduction on expenses incurred on purchases or hiring of computer software programmes registered with the Digital Economy Promotion Agency from 1 January 2017 to 31 December 2019. SMEs are companies with annual gross revenue not exceeding THB 30 million and paid up capital of not more than THB 5 million as at the end of the financial year.

JURISDICTION:

Vietnam

Proposed law to replace the Law on Tax Administration

The proposed changes primarily focus on simplifying tax administration and increasing tax inspections. Some changes are also proposed to achieve consistency with changes in other regulations. The proposal is expected to be submitted for the National Assembly's consideration at the 1st and 2nd sittings in 2018 and the 1st meeting in 2019. The draft tax admin law is expected to become effective on 1 January 2020 or 1 July 2020.

The proposed law contains:

- Guidance on tax management for certain specialised industries such as e-commerce (international transactions must be paid for through National Payment Corporation of Vietnam, so that the authorities can manage the revenue from ecom transactions to tax foreign ecom companies, who are required to establish a representative office in Vietnam), hydro-electricity, telecommunications, airlines, oil and gas.
- Provisions to increase the international co-operation on tax matters, such as information exchange.
- Increased attention on the application of electronic methods to collect and manage taxpayer data.
- Provisions to introduce E-invoicing.
- Changing the tax declaration procedures to integrate the tax corporate tax return into the financial statements of the taxpayer.
- Guidance on related party transactions (what must be disclosed, how to determine the arm's length price, CbC reporting.
- Simplified admin procedures for individuals.

International tax developments

Latvia
On 19 October 2017, Latvia and Vietnam signed an income tax treaty in Riga.

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Prior to arriving in Singapore in 1996, he was based in Jakarta and Hong Kong. His practice focuses on advising tax matters such as direct investment, restructurings, financing arrangements, private equity and holding company structures into or from locations such as mainland China, Hong Kong, Singapore, India, Indonesia and the other ASEAN countries.

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