Asia Tax Bulletin

Summer 2022

In This Edition

We are pleased to present the Summer 2022 edition of our firm's *Asia Tax Bulletin.*

Dear Reader,

The times are changing. Due to pressure from the European Union, Hong Kong has issued the framework of how it proposes to change its long-cherished offshore taxation rules applicable to passive investment income. Hong Kong proposes to tax offshore investment income unless the Hong Kong company receiving the income meets certain economic substance rules or if the income is not received in Hong Kong. At the same time, Hong Kong will introduce a participation exemption rule for foreign dividends and gains earned by Hong Kong companies, based on which these foreign dividends and gains would not be taxable in Hong Kong if they meet the pertinent conditions. You will read more about that in this edition of the Asia Tax Bulletin.

Further, China and Hong Kong have ratified the Multilateral Treaty and therefore certain of their tax treaties will now be subject to the anti-avoidance test contained in the Multilateral Treaty. This may have consequences for investments in Japan held by Hong Kong holding companies, which henceforth may be challenged if one of the main purposes of the structure is to benefit from the tax treaty.

Hong Kong proposes to introduce tax exemptions for qualifying family offices and at the same time Singapore is tightening the tax exemption conditions for family offices if they are not managed by a CMS-licensed fund manager. Finally, a point worth mentioning is that Malaysia has introduced tax exemptions for qualifying venture capital companies, which adds Malaysia to the short list of jurisdictions besides Singapore and Hong Kong who promote their jurisdiction for venture capital activities in Asia.

These and other news items are discussed in this edition of the Bulletin.

We hope that you will find this useful.

Pieter de Ridder

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JURISDICTION:

China (PRC)

Multilateral Treaty (MLI)

On 25 May 2022, China became the 75th country to deposit its instrument of approval for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The convention will enter into force for China on 1 September 2022. China submitted it MLI position on 7 June 2017, listing its provisional reservations and notifications and including 102 tax treaties that it wishes to be covered by the MLI.

VAT Exemption Delivery Services

Following the decision of the State Council on 27 April 2022 to exempt express delivery services from value added tax (VAT), the Ministry of Finance and the State Taxation Administration jointly issued a circular for implementation on 29 April 2022 (Circular [2022] No.18). According to the Circular, revenue derived by taxpayers engaged in express delivery services of necessities will be exempt from VAT from 1 May to 31 December 2022. For qualifying services, the Circular refers to the services as defined and explained in the section: "sales services, intangibles and immovable properties" of Circular [2016] No.36.

Coal Import Tariff

From 1 May 2022 to 31 March 2023, the import duty on imports of seven coal products, that are subject to the most-favoured nation tariffs ranging from 3% to 6%, will be reduced to zero. This temporary adjustment is announced in the Public Notice of the Customs Tariff Commission of the State Council [2022] No. 6.

Extra-deduction for R&D Expenses

Through Joint Public Notice of the Ministry of Finance, the State Taxation of Taxation, and the Ministry of Technology [2022] No. 16 on 23 March 2022, China has increased the additional deduction amount for R&D expenses incurred by small and medium-sized technology enterprises from 75% to 100% of the actual expenses from 1 January 2022. If the R&D activities have created an intangible asset, the amortization base of that intangible asset will be increased from 175% to 200% of the expenses.

Stamp Duty

Courtesy of the International Bureau of Fiscal Documentation -– the Ministry of Finance (MoF) and the State Taxation Administration (STA) have published a set of implementation rules for the Stamp Duty Law that took effect on 1 July 2022 (Public Notice of MoF and STA [2022] No. 22) which deal with the following specific matters:

- In the case of an entrusted loan agreement, the taxpayer is an entrusted service provider and borrower, not the client that lends money. In the case of a transaction through an auction, the auctioneer is not regarded as the taxpayer.
- Dutiable contracts or instruments that are entered into, or drawn up outside, but are used within China, are subject to stamp duty in the following circumstances:
  - » the underlying subject (of the contract or instrument) is an immovable property situated within China;
  - » the underlying subject is an equity interest owned by a Chinese resident enterprise;
  - » the underlying subjects are movable property or trademark, copyright, patent, the right to know-how, and either the seller or the buyer is located within China, except where the movable property or rights are sold by a foreign entity or individual to a Chinese buyer for their entire use outside China; and
  - » the underlying subject is a service of which either the provider or recipient is located within China, except where the service provided by a foreign entity or individual to a Chinese entity or individual is wholly performed outside China.
- The following documents are 'out of the scope' of the Stamp Duty Law and therefore not taxable:
  - » juridical documents issued by People's Courts, decisions of arbitration of arbitration institutions, documents of prosecution;
  - » contracts and agreements on residential properties in respect of expropriation, reclaiming, redemption of damages by local governments above the county level; and
  - » documents/certificates used between head offices and branches and between branches themselves as operational plans.
- In a transaction of equity interest, the tax base is the amount agreed in the contract of transfer and does not include the amount of subscribed, but not paid-up capital.

JURISDICTION:

Hong Kong

Hong Kong's Foreign Income Tax Reform

Due to pressure from the European Union, the Hong Kong government is proposing to change the offshore tax regime for the taxation of foreign dividends, interest income, royalty income and gains on the sale of shares or similar interests. This change will have a profound effect on the taxation of such income in Hong Kong and we recommend that timely action be taken to prepare for the tax changes. The government is planning to submit a draft of the new tax provisions to parliament in October 2022. The proposed changes are due to take effect on 1 January 2023 (which is the deadline imposed on Hong Kong by the European Union).

Foreign Dividends, Interest and Royalty Income

It is proposed that with effect from 1 January 2023, foreign dividends, interest and royalty income earned by Hong Kong resident companies from overseas affiliates* will qualify as offshore sourced income only provided that either (i) the income has not been received in Hong Kong *or* (ii) the Hong Kong resident company satisfies the economic substance tests. The economic substance tests will look at whether the company employs a sufficient number of qualifying employees and incurs sufficient operating expenditure, the details of which are still to be issued. The question whether the company has 'received' the income in Hong Kong will depend on whether the income was remitted to Hong Kong or whether it will be deemed to have received the income, e.g. if the company uses the offshore funds to service intercompany debt. If the foreign dividends, interest or royalty would not be received in Hong Kong, then these items of income will in principle continue to be offshore sourced income and not taxable in Hong Kong. With the introduction of the 'receipt' rule, Hong Kong seems to be following Singapore's and Malaysia's direction.

In the event the economic substance tests are not met, foreign dividends received in Hong Kong will not be taxable if the new participation exemption rule applies, which requires the Hong Kong resident company to own at least 5% of the shares of the foreign entity, the latter's income must for less than 50% consist of passive investment income and the dividend or underlying profits must be subject to tax at a headline tax rate of at least 15%. This should generally not be a problem where the Hong Kong resident company owns shares of a company in the PRC – but it may be problematic for private equity or venture capital holding companies if there is an intermediary holding company between the Hong Kong entity and the active subsidiary.

Sale of Shares or Similar Equities in Foreign Companies

A sale of shares or similar equity interests will no longer be eligible for the offshore source claim even if the sale would have been negotiated and concluded outside Hong Kong unless the Hong Kong resident company meets the economic substance rules or if the new participation exemption rule, discussed above, applies.

Foreign Royalty Income

Foreign royalty income received in Hong Kong will be exempt from tax in respect of royalties which are paid for patents and similar rights developed in Hong Kong and computed in accordance with the modified nexus rules developed by the OECD. 'Developed' in Hong Kong means that R&D is conducted in Hong Kong, either by the Hong Kong company itself or through outsourcing to an affiliate in Hong Kong or an external party in or outside Hong Kong.

Unilateral Tax Credit

To avoid double taxation if, as a result of the new tax law, both Hong Kong and a foreign jurisdiction tax the same income and in the event there is no double tax treaty between the two jurisdictions, the new tax law will include a unilateral tax credit for foreign tax incurred on the income taxed in Hong Kong. This marks a new step forward, as Hong Kong currently gives tax credits only under double tax treaties.

Preliminary Conclusion

Details are still awaited about the economic substance requirements. We are also expecting more information about the consequences of not meeting the economic substance rules in respect of the sale of shares of foreign companies where the economic substance conditions or the new participation exemption rule are not met, as it seems that the new law intends to abolish the 'capital' argument which has been one of the fundamental principles of Hong Kong's income tax system (income of a capital nature is not taxable). The proposed tax reform will change the tax position for companies' resident in Hong Kong engaged in investment holding activities, lending or IP exploitation. It will likely have an impact on holding companies for private equity and venture capital investors, who should revisit their existing holding structures in order to either meet the economic substance requirements, make arrangements to avoid receiving foreign dividends in Hong Kong or adapt their holding structure to the new participation exemption rule.

*An affiliate is an entity which is included line by line in the consolidated financial accounts of the same group as the Hong Kong entity earning the income.

Profits of Interposed Hong Kong Company are Not Taxable

In its judgment on 20 April 2022 in *Newfair Holdings Ltd. v. Commissioner of Inland Revenue*; the Court of First Instance of the Hong Kong High Court ruled that the profits of an interposed Hong Kong company did not have a Hong Kong source and are thus not subject to profits tax in Hong Kong. Newfair was incorporated in Hong Kong on 9 October 2013 and a subsidiary of a Dutch company, VBZH, since 15 October 2013. The principal business carried on by the VBZH Group was the distribution in European markets of electronic products sourced from manufacturers in the Far East.

Before Newfair was established, merchandise was sent to VBABV (a member of the Group) directly by the suppliers. Soon after its incorporation, Newfair entered into a Master Purchase Agreement (as purchaser) with a supplier and a Master Sales Agreement (as seller) with VBABV (as purchaser), whereby VBABV would acquire exclusive European distribution rights to the merchandise. The interposition of Newfair between VBABV and the suppliers was to achieve fiscal efficiency as advised by the Group's tax advisors. Both agreements were negotiated, concluded and executed outside Hong Kong.

Newfair's registered office (HK Office) was the office of an accounting firm in Hong Kong. Newfair never physically operated in the HK Office and never engaged any employees, officers or agents in Hong Kong. All office work was done by the purchasing manager of VBABV. The only local asset Newfair owned was a Hong Kong bank account, which was used to pay the suppliers and receive revenues.

The transactions that generated the profits of Newfair were the purchase of merchandise from the suppliers and the resale of the same at a 35% mark-up to VBABV. The purchase prices were determined through negotiations mainly between VBZH (specifically one of its shareholders) and the suppliers, exclusively outside Hong Kong, and once the transactions were agreed, the purchasing manager of VBABV would attend to the follow up work with the suppliers by email. The commercial operations relevant to the production of Newfair's profits were done outside Hong Kong.

Newfair was assessed to tax on the profits from the sale of merchandise to VBABV, and it appealed against the assessment. However, the Inland Revenue Board of Review found, in its decision dated 19 January 2021 (Case No. D14/20), that Newfair, being interposed between the Dutch purchaser and the suppliers, earned its profits by being an entity in Hong Kong with a Hong Kong bank account, and its profits were derived from Hong Kong.

The issues before the Court were whether Newfair carried on a business in Hong Kong, and whether Newfair's profits of that business arose in or were derived from Hong Kong. The Court overturned the Board of Review's decision, holding that Newfair did not have a business in Hong Kong, the profits of which were offshore and did not arise from commercial operations in Hong Kong. Therefore, Newfair was not subject to profits tax in Hong Kong in the relevant years of assessment.

In coming to its decision, the Court agreed that the tax law imposes a tax liability on what an entity does, and not what it is. The interposition of Newfair as an intermediary entity was not in itself a commercial operation that generated taxable profits, and the operation of the Hong Kong bank account was administrative in nature and could not amount to profit-producing operations. Among other notable factors, the fact that all the commercial operations relevant to the production of Newfair's profits were conducted outside Hong Kong, and that the contracts for sale and purchase of the merchandise were executed offshore, were relevant in determining that the profits did not have a Hong Kong source.

Shipping Tax Exemption

The Government published the Inland Revenue (Amendment) (Tax Concessions for Certain Shipping-Related Activities) Bill 2022 in the *Gazette* today on June 2, 2022. The Bill will be introduced into the Legislative Council for first and second readings on June 15.

The Bill seeks to amend the Inland Revenue Ordinance (IRO) (Cap. 112) to give half-rate profits tax concessions (i.e. at a tax rate of 8.25% to qualifying shipping commercial principals (i.e. ship agents, ship managers and ship brokers). The profits derived by a qualifying shipping commercial principal from carrying out a qualifying activity for an associated shipping enterprise, which is entitled to a concessionary tax rate or income exemption under the IRO, will also be subject to the same concessionary tax rate or income exemption as those applicable to the associated shipping enterprise. Anti-abuse provisions are included in the Bill to safeguard the integrity of the tax system and comply with international tax rules.

"Ship agency, ship management and ship broking businesses are important maritime business services supporting international shipping activities. The legislative amendments would provide tax incentives for qualifying ship agents, ship managers and ship brokers to operate in Hong Kong. As these businesses serve to facilitate ship ownership and operation, which also generate demand for other maritime business services, fostering the development of shipping commercial principals in Hong Kong is conducive to the growth of our shipping business and maritime cluster," a spokesman for the Transport and Housing Bureau said.

Recognising the business opportunities arising from the growth of shipping commercial principals, the competitive landscape for maritime business in the region and Hong Kong's strong fundamentals as an international maritime centre, the Government announced in the 2021 Policy Address its plan to introduce tax concessions for shipping commercial principals. The Bill will introduce tax measures to strengthen Hong Kong's competitiveness in attracting ship agency, ship management and ship broking activities which will also help attract the setting up of related maritime business establishments in Hong Kong, thereby consolidating the city's position as an international maritime centre.

Family Offices

The Finance Secretary announced on 1 June that the Hong Kong Government have completed an industry consultation and are formulating legislative proposals to provide profits tax exemption for Family-owned investment holding companies' assessable profits earned from qualifying transactions. The target is to introduce the amendment bill into the Legislative Council (LegCo) in the second-half of this year. Subject to the passage of the amendment bill by the LegCo, the tax concession treatment will apply for any years of assessment commencing on or after April 1, 2022. The proposal would attract family offices to domicile in Hong Kong, thereby generating more demand for investment management and other related professional services, including financial, legal, and accounting services. It will also deepen Hong Kong's funding pool and create more business opportunities for the financial services industry.

International Tax Developments

Multilateral Tax Treaty (MLI)

On 25 May 2022, the instrument of approval for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) was deposited for Hong Kong. To date, 76 jurisdictions have now ratified, accepted or approved the BEPS Convention. The convention will enter into force for Hong Kong on 1 September 2022. Hong Kong's MLI position submitted on 7 June 2017 listed its provisional reservations and notifications and included 36 tax agreements that it wished to be covered by the MLI.

Japan

On the 3rd of June, the Japanese Ministry of Finance issued a statement that the MLI applies to its tax treaty with Hong Kong and therefore that tax treaty benefits can be denied if one of the main purposes of a structure is to obtain the benefits of the tax treaty and if this is not consistent with the purpose of the treaty itself.

Rentals Tax Deductible for Individuals

The Inland Revenue (Amendment) (Tax Deductions for Domestic Rents) Bill 2022 was passed by the Legislative Council on 22 June 2022. The Bill provides a tax deduction of up to HKD 10,000 per annum to individuals residing in Hong Kong in respect of rentals paid for their primary place of residence so long as the tenancy agreement has been properly stamped and is not excluded under the rules. The Bill contains a number of anti-avoidance provisions to avoid that people who own residential property in Hong Kong claim a deduction for rental cost. It also denies the deduction to situations where the landlord and the tenant are associated.

JURISDICTION:

India

No Beneficial Ownership Requirement for Capital Gains Tax Exemption

Courtesy Morison Legal, in a recent ruling delivered by the Mumbai Income-Tax Appellate Authority ("ITAT"), the ITAT considered whether the beneficial ownership of shares is a relevant criterion for a taxpayer, under the India-Mauritius Double Taxation Avoidance Agreement (the "DTAA"), to avail itself of capital gains tax benefits under Article 13 of the DTAA.

The issue was raised in the case of Blackstone FP Capital Partners Mauritius V Limited ("Blackstone"), a company incorporated in Mauritius and holding a global business licence and a tax residence certificate. In the financial year 2015-2016, Blackstone, a subsidiary of Blackstone FP Capital (Mauritius) VA Ltd (the "Parent Company") incorporated in the Cayman Islands, sold certain shares of CMS Info Systems Ltd, an Indian company to Sion Investment Holdings Pte Ltd, a Singaporean entity (the "Sale Transaction"). The capital gains of Blackstone from the Sale Transaction amounted to approximately INR 9.05 billion.

Stand of the Central Board of Direct Taxes

Blackstone, being tax resident in Mauritius, sought to claim treaty benefits under Article 13 of the DTAA. Blackstone contended that it should have been taxed in Mauritius as long as it could demonstrate that its management and control was being exercised from Mauritius. The Central Board of Direct Taxes (the "CBDT"), however, denied the application of the DTAA to the Sale Transaction, stating, amongst other reasons, that essentially:

- The Sale Transaction was a 'scheme' designed for the benefit of the Parent Company; and that
- The effective ownership and control of Blackstone was vested with the Parent Company.

The CBDT therefore concluded that it was the Parent Company which ultimately stood to benefit from the capital gains derived from the Sale Transaction. Since the Parent Company was a Cayman Islands entity, the India-Mauritius

DTAA could not be applied to the Sale Transaction. Feeling aggrieved by the decision, Blackstone lodged an appeal before the ITAT.

When reviewing the decision of the CBDT, the ITAT primarily ruled that beneficial ownership with respect to capital gains is not expressly mentioned in Article 13 of the DTAA, in contrast with the provisions in Article 10 (Dividends) and Article 11 (Interest) of the DTAA. In the absence of any specific reference to beneficial ownership in Article 13 of the DTAA, the CBDT should not have inferred that beneficial ownership was a necessary condition for Blackstone to claim capital gains tax benefits under Article 13 of the DTAA.

The ITAT further stated that treaties are bilaterally agreed, and the requirements and intent of each provision have been specifically deliberated and agreed upon between the signatories of the treaty.

The matter was referred to the CBDT and it is expected that the CBDT will now follow well-established legal principles and judicial precedents in ascertaining the extension of treaty benefits to a taxpayer who meets the requirements laid down by both jurisdictions.

Key Takeaways

A DTAA or treaty is nothing more than a contract between two states. Hence, a strict interpretation is necessary to uphold the certainty and predictability that the contracting parties seek to achieve. Any deviation from such a strict interpretation is likely to result in confusion and be nefarious to commerce and industry between the jurisdictions.

When interpreting international treaties, it is fundamental to uphold the principles of the Vienna Convention on the Law of Treaties, notably Article 26 which provides that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

Stakeholders have observed that a wide interpretation of the treaty, such as the 'reading-in' of a beneficial ownership test which is not specifically embedded in the DTAA, is tantamount to re-writing the treaty provisions. The latter exercise, it should be stressed, lies within the sole purview of the governments of India and Mauritius.

Parliament Passes Budget Proposals

On 1 February 2022, the Finance Minister presented the Finance Bill 2022 in the Lower House of Parliament which were passed on 24 March 2022 with amendments, which are set out below.

Taxation of Virtual Digital Assets (VDAs)

The definition of "transfer" in section 2(47) of the Income Tax Act, 1961 (ITA) will apply to the transfer of VDAs, irrespective of whether a VDA is a capital asset or not. Further, the loss incurred from the transfer of a VDA cannot be set off against the income earned from the transfer of another VDA or any other income.

The new section 194S of the ITA will have overriding effect only to the provisions of section 194-O (i.e. the provisions relating to payment of certain sums by e-commerce operators to e-commerce participants) and not to any other tax deducted at source (TDS) provisions.

TDS on Perquisites of a Business or Profession

The Central Board of Direct Taxes (CBDT) will have the power to issue guidelines for removing any difficulty faced while adhering to the provisions of the new TDS on perquisites of a business or profession.

Health and Education CESS

The assessing officer (AO) can treat the health and education cess claimed and allowed in earlier years as under reported income for the purpose of levying penalty under section 270A of the ITA. No penalty will be levied if the taxpayer makes an application to the AO requesting the re-computation of income and subsequently pays taxes within the stipulated time.

Business Reorganization

The term "business reorganization" has been replaced by the word "succession", and it is clarified that assessment or other proceedings initiated or pending or completed on the predecessor will be deemed to have been initiated or made on the successor in a business reorganization and will remain valid.

Further, the terms "business reorganization" and "successor" will be defined in an Explanation to a new section 170A of the ITA.

Extended Due Date for Completion of Assessment – AY 2020-21

The due date for completing the assessment of AY 2020-21 has been extended from 31 March 2022 to 30 September 2022.

Due Date for Completion of Assessment in Cases Relating to a Search

The due date for completing the assessment of AY 2021-22 for the following assessee will be on or before 30 September 2022:

- in a case where a search was executed by CBDT during the FY commencing 1 April 2020; or
- the books of account or documents or assets of another person seized and handed over to the AO having jurisdiction of such other person during the FY commencing 1 April 2020.

Definition of "Books Of Accounts" Under Section 2(12a) of the ITA

The definition of "books of accounts" will include accounts in a written form or in electronic or digital form, or as printouts of data stored in such electronic or digital form.

JURISDICTION:

Indonesia

VAT on Import of Digital Goods and Services

The Ministry of Finance (MoF) has updated the regulation regarding the procedures for appointing collectors, collecting, depositing, and reporting value added tax (VAT) on the use of intangible taxable goods and/or taxable services from abroad by domestic consumers via electronic systems. The update aims to provide more legal certainty, fairness, and harmonization of the provisions regarding VAT rates and VAT reporting.

MoF Regulation No.60/PMK.03/2022 (PMK-60) of 30 March 2022 comes into effect from 1 April 2022 and replaces MoF Regulation No. 48/PMK.03/2020 (PMK-48). PMK-60 updates the change in the VAT rate pursuant to the Harmonization of Tax Regulations Law and obligations of VAT collectors as follows:

- the new VAT rate is 11%, which took effect from 1 April 2022 and will rise to 12% from 1 January 2025; and
- in the event that a foreign seller or a foreign service provider conducts a transaction with a buyer of goods and/or services recipient through a foreign e-commerce marketplace or domestic e-commerce marketplace, the VAT payable for the use of intangible taxable goods and/or taxable services from abroad within Indonesia, is levied, deposited, and reported by foreign traders, foreign service providers, foreign e-commerce marketplaces, or domestic e-commerce marketplaces appointed as VAT Collectors that will issue commercial invoices, billing, order receipts, or similar documents as proof of VAT collection.

Tax on cryptoassets

Courtesy IBFD, it was reported that Indonesia will impose income tax and value added tax (VAT) on cryptoasset trading transactions from 1 May 2022. The details of the taxes on cryptoasset trading transactions are available in the Minister of Finance Regulation Number 68/PMK.03/2022 of 30 March 2022. The salient features of the regulation are set out below:

Designation as VAT Collectors

E-commerce providers that facilitate cryptoasset trading transactions (e-commerce trading operators), including *cryptoasset physical traders* and cryptoasset electronic wallet service providers, will be designated as VAT collectors on the taxable delivery of cryptoassets from the seller to the buyer. Under the regulation, a cryptoasset physical trader is a party that has obtained approval from the competent authority in accordance with laws governing commodity futures trading (i.e. the Commodity Futures Trading Regulatory Agency (BAPPEBTI)) to conduct cryptoasset transactions on their (cryptoasset physical trader's) behalf and/or facilitate transactions between cryptoasset sellers and buyers.

Income Tax

- The income of cryptoasset sellers is subject to a final tax of 0.1% of the transaction value if the cryptoasset transaction is carried out through an electronic facility provided by an e-commerce trading operator that is a cryptoasset physical trader, or 0.2% of the transaction value if the e-commerce trading operator is not a cryptoasset physical trader;
- Income received or obtained from cryptoasset transactions conducted through electronic facilities provided by e-commerce trading operators is subject to a final tax of 0.1% of the transaction value, where the e-commerce trading operator has obtained approval from BAPPEBTI, or 0.2% of the transaction value, where the e-commerce trading operator does not have approval from BAPPEBTI;
- The income of cryptoasset miners, such as gains from the cryptoasset system in the form of block rewards and rewards for transaction verification services, is subject to a final tax of 0.1% of the transaction value;
- The income of e-commerce trading operators for the provision of electronic facilities used for cryptoasset transactions is subject to the prevailing tax rate under the Income Tax Law.

VAT

The delivery of the following goods and services is subject to VAT:

- Cryptoassets, by cryptoasset sellers;
- provision of electronic facilities used for cryptoasset trading transactions, by e-commerce trading operators; and
- cryptoasset transaction verification services and/or cryptoasset miner group management services (mining pool), by cryptoasset miners.

The abovementioned delivery of cryptoassets includes the delivery of cryptoassets (i) from cryptoasset sellers in Indonesia; and/or (ii) to cryptoasset buyers in Indonesia, through electronic facilities organized by e-commerce trading operators. Delivery can be in the form of:

- buying and selling cryptoassets with fiat money;
- exchanging one cryptoasset for another (swap); and/or
- exchanging cryptoassets with goods (other than cryptoassets) and/or services.

The VAT payable on such transactions is computed as follows:

- 1% of the VAT rate multiplied by the transaction value of the cryptoassets, where the e-commerce trading operator is a cryptoasset physical trader;
- 2% of the VAT rate multiplied by the transaction value of the cryptoassets, where the e-commerce trading operator is not a cryptoasset physical trader; and
- for cryptoasset mining services, 10% of the VAT rate multiplied by the monetary value of the cryptoassets received by cryptoassets miners, including cryptoassets received from the cryptoasset system e.g. block rewards.

Japan

Hong Kong Tax Treaty

On 3 June 2022, the Ministry of Finance issued a statement that the anti-avoidance provisions of the Multilateral Instrument (MLI) ratified by Japan now also apply to its tax treaties with the PRC and Hong Kong, respectively. This means that if one of the main purposes of a structure is to obtain the benefits of Japan's tax treaty with either of these jurisdictions, the benefits of the tax treaty may be denied unless it is consistent with the purpose of the tax treaty itself. This point will be especially relevant in practice for Japan's tax treaty with Hong Kong.

Korea

Software Payments

Courtesy Lee & Ko, in an important tax case recently decided by the Seoul Administrative Court (2019Guhap70643, February 5, 2021) involving certain payments for the purchase of software by a Korean subsidiary to its US parent, which were ruled to be 'business profits' under Korea's tax treaty with the USA and therefore, in the absence of a permanent establishment in Korea, not subject to withholding tax. This case appears to disagree with the approach taken by another court in a similar matter involving the Korean subsidiary of PTC, the US computer software and services company (PTC Korea Case).

Factual Background

A Korean subsidiary of a US parent (Plaintiff) imported software products such as 3D engineering design software from its U.S. parent and sold the products to domestic plant design companies and shipbuilding companies together with maintenance, repair, consulting, and education services relating to the products. The Plaintiff treated the consideration paid to the U.S. parent for importing the software products as a payment for goods (i.e., as business profits of the U.S. parent that has no permanent establishment in Korea), which is not taxable in Korea pursuant to Article 8 of the Korea-U.S. Tax Treaty. On the other hand, the Korean Tax Authority treated such payment as Korean sourced royalty income since it was consideration paid for the use or transfer of know-how and therefore imposed withholding tax on the income under Article 14 of the Korea-US Tax Treaty.

Issue and the Court's Decision

The main issue of this case is whether the consideration paid by the Plaintiff for the purchase of software should be treated as business profits in the hands of the US parent (not subject to withholding tax) or as royalty income that is received for the transfer or use of know-how and technology (subject to withholding tax).

After a detailed review of the facts and circumstances introduced over several stages of litigation, including a methodical explanation by the taxpayer of its business model and how the various software product purchased was actually used by its customers, the Seoul Administrative Court determined that the payment for the software at issue was for the purchase of software products and therefore, should be treated as business profits rather than as royalties.

Specifically, the court found that the software at issue in this case was a final product and no right to copy the software was granted and the Defendant failed to prove that any actual modification was made to the products. In this regard, the consulting service that the Defendant raised as demonstrating that know-how was transferred mostly involved nothing more than a mere setting up of installation requirements or a transmission of data irrelevant to the software. In addition, the court observed that the software at issue appears to be widely used by customers who are similarly situated or in similar business sector and further noted the Defendant failed to identify what specific know-how has been allegedly received by the Plaintiff from the U.S. parent. While the Defendant argued that the high price of the software, the obligation to maintain confidentiality, and other company's withholding on other transactions supported its position, the court ruled that they were insufficient criteria for a judgment in their favor. Another interesting point noted by the court was that the Plaintiff had the status of a distributor and it was not engaged in the business of receiving any nondisclosed source code from the US parent nor had any history of providing modified software to customers.

Significance of this Court Decision

The Supreme Court ruled, through a series of decisions it made in the 1990s, on whether the consideration paid for software should be considered as royalty income or not. However, these decisions were brief and lacked detailed technical analysis and legal reasoning. Moreover, the Korean Tax Authority has long chosen to not acquiesce, and instead has continued its program of disputing with the taxpayers on issues involving source and characterization of income under the USKorea Tax Treaty. In the PTC Korea Case, both the lower court and the high court ruled against the Plaintiff and the case is currently pending in front of the Supreme Court. Although the Korean Tax Authority asserted repeatedly throughout this case that the court should follow the decisions in the PTC Korea Case, the court was persuaded that the Korean Tax Authority, not the taxpayer, has the burden of proving that a transfer of know-how occurred. As a result, the court was persuaded to consider that all relevant evidence submitted by the taxpayer that the payment at issue was essentially consideration for the purchase of software products and not rush to any decision based on the Korean Tax Authority's insistence that the PTC Korea decision should be followed. By presenting evidence from every possible perspective, including submission of a video showing an actual demonstration of how the software at issue is applied, the court correctly understood the functionality and purpose of the software - which proved to be critical in this case.

Reduced Corporate Tax Rate and Participation Exemption for Foreign Dividends

On 16 June 2022, the new Korean government released its first economic policy initiatives which include tax-related proposals. In particular, to provide incentives for corporate investment and job creation, the new government proposed to lower the maximum corporate tax rate from 25% to 22% (including a simplification of the brackets), introduce a participation exemption for dividends received from foreign subsidiaries, and increase the deduction limit for carry-forward losses.

To improve the tax system for distributions of retained income and mitigate the issues of double taxation for companies, the new government proposes the following:

- increasing the portion treated as non-taxable income for dividends received by a Korean company from its Korean subsidiary. Currently, 30%-100% of the dividend received is treated as non-taxable income depending on the shareholding of the company receiving the dividend and the type of company paying the dividend. The new government's economic policy initiatives propose to simplify such non-taxable percentages going forward; and
- treat the dividends as non-taxable income for dividends received by a Korean company from its foreign subsidiary. Currently, dividends received by a Korean parent from its foreign subsidiary are treated as taxable income in Korea, and the Korean parent can claim foreign tax credits for taxes paid outside Korea.

The new government proposes to increase the carry-forward loss deduction limit for ordinary corporations from 60% to 80% of the taxable income for the fiscal year. For SMEs, the current 100% deduction limit will be maintained.

These proposed amendments are subject to approval by the Korean National Assembly, and the government's plan is to obtain the National Assembly's approval this year such that the changes become effective from 2023. However, since the opposition party holds the majority of seats in the National Assembly, it is unclear whether the above proposals will actually be enacted into law.

JURISDICTION:

Malaysia

Windfall Tax 2022

On 5 April 2022, the Ministry of Finance (MoF) has gazetted a law providing an exemption from the one-off tax of 33% (*Cukai Makmur*) for foreign-sourced income received in Malaysia in the year of assessment (YA) 2022. *Cukai Makmur* is a one-off tax levied on the chargeable income of companies exceeding MYR 100 million earned during YA 2022.

The exemption will apply to a company (i) that is incorporated or registered under the Companies Act 2016 and is a resident in Malaysia, and (ii) which has received income in Malaysia from outside Malaysia from 1 July 2022.

> The chargeable income of a company in relation to any foreign-sourced income received in Malaysia for the YA 2022 that is exempt from *Cukai Makmur* will be determined according to the following formula:
>
> A/B X C
>
> where:
>
> "A" is the statutory income in relation to the foreign-sourced income received in Malaysia for the YA 2022;
>
> "B" is the aggregate income for the YA 2022; and
>
> "C" is the chargeable income of the company for the YA 2022.

The portion of the chargeable income of the company that is exempt from *Cukai Makmur* will be subject to tax at the prevailing rate of 24%.

Tax Corporate Governance Framework

Following Singapore's lead, on 11 April 2022 the Malaysian Inland Revenue Board issued the tax corporate governance framework ("TCGF") and guidelines to guide organisations in designing and operating their TCGF and encourage voluntary participation in the TCGF Programme. It targets large companies or companies with a good compliance record to apply for the programme. Successful applicants will receive faster refunds, enjoy reduced scrutiny in tax compliance matters and a dedicated officer will be appointed to them. It is voluntary.

Tax Exemption for Venture Capital Companies

Courtesy the International Bureau of Fiscal Documentation (IBFD), it was reported on 21 April that the Ministry of Finance (MoF) has gazetted three legislative supplements providing a tax exemption for venture capital companies (VCCs) and venture capital management companies and a deduction for investments in venture companies or VCCs. The laws are deemed to be effective from the 'Year of Assessment '(YA) 2018 and replace an the previous regulations issued in 2005.

Tax Exemption for a VCC (Income Tax (Exemption) (No. 2) Order 2022 (PU(A) 115/2022))

- A VCC may be exempt from tax in respect of its statutory income on all sources of income commencing from the YA in which the VCC obtains its first certification from the Securities Commission of Malaysia (SC) (received not later than 31 December 2026), subject to conditions.
- The income tax exemption will be granted for a period of 5 YAs or the YAs equivalent to the remaining life of the fund established for the purpose of investing in a venture company, whichever is the lesser (i.e. the exemption period).
- Losses incurred by a VCC from the disposal of an investment in a venture company within the exemption period may be carried forward to the YA following the exemption period and deducted against the statutory income from all sources of income.

Tax Exemption for a Venture Capital Management Company (Income Tax (Exemption) (No. 3) Order 2022 (PU(A) 116/2022))

- A venture capital management company may be exempt from tax in respect of the statutory income derived from the management of a VCC fund received from a VCC (under an agreement entered into with the said VCC) in relation to:
  - » share of profits;
  - » management fee; and
  - » performance fee including performance bonus and carried interest.
- The above exemption is for the period YA 2018 until YA 2026 (i.e. the exemption period).
- Losses incurred by the venture capital management company from the management of a VCC fund in any YA in the exemption period may be carried forward to the YA following the exemption period and utilised against the statutory income derived from the management of the VCC fund.

Deduction for Investments in Venture Company Or Vcc (Income Tax (Deduction for Investment in a Venture Company or Venture Capital Company) Rules 2022 (PU(A) 117/2022))

- A company or an individual who invests in a venture company or VCC on or after 27 October 2017 but not later than 31 December 2026 may be allowed a deduction against the business income equal to:
  - » the value of investment; or
  - » for investments made in a VCC, the value of investment or MYR 20 million, whichever is lesser.
- The deduction may be claimed in the YA where the investment was held for a period of 3 years and the investment holding period is certified by the SC. Other prescribed conditions to qualify for the deduction will apply.
- This deduction is not applicable to a VCC that is exempted from tax under PU(A) 115/2022.

Principal Hub Tax Incentive

Courtesy Skrine & Co, the Minister of Finance of Malaysia announced on 6 November 2020 that the tax incentive for principal hub, which was due to expire on 31 December 2020, will be extended until 31 December 2022 and that the tax incentive conditions will be relaxed. The Income Tax (The Principal Hub Incentive Scheme) Rules 20222 ('the 2022 Rules'), gazetted on 24 May 2022, set out the new conditions for tax incentives under the Principal Hub Incentive Scheme and have effect from year of assessment ('YA') 2021.

A 'principal hub' is a locally incorporated company that uses Malaysia as a base for conducting its regional or global businesses and operations to manage, control, and support its key functions including management of risks, decision making, strategic business activities, finance, management, and human resource.

The income of a qualifying company derived from a qualifying activity under the Principal Hub Incentive Scheme ('the Scheme') will be subject to tax at rate of 0% (Category 1), 5% (Category 2) or 10% (Category 3) as set out in Schedule 2 to the 2022 Rules for five consecutive YAs ('specified YAs') commencing from a date determined by the Minister of Finance ('Minister'). In addition, a qualifying company must satisfy the relevant conditions set out in Schedule 2 and any other conditions imposed by the Minister as specified in his approval letter and the Guidelines for Principal Hub Incentive 3.0 ('Principal Hub Guidelines 3.0') issued or as revised by the Malaysian Investment Development Authority ('MIDA') and as approved by the Minister.

No.	Cluster	Qualifying Service
1.	STRATEGIC SERVICES	(a) Regional profit and loss or business unit management. (b) Stargeic business planning corporate development. (c) Brand management. (d) Intellectual property management.
2.	BUSINESS SERVICES	(a) Bid and tender management. (b) Treasury and fund management. (c) Research, development and innovation. (d) Project management. (e) Sales and marketing. (f) Business development. (g) Technical support and consultancy. (h) Information mangement and processing. (i) Economic or investment research analysis. (j) Strategic sourcing, procurement and distribution. (k) Logistics services.
3.	SHARED SERVICES	(a) Corporate training and human resource management. (b) Finance and accounting (transactions, internal audit).

A qualifying activity is a service activity set out in rule 4 of the 2022 Rules undertaken by a qualifying company as specified in Schedule 1 of the 2022 Rules and fulfils the eligibility condition prescribed by the Minister. The qualifying activities, as set out in Schedule 1, are as follows:

A qualifying company may be a new company or an existing company, each as defined in rule 3 of the 2022 Rules, which fulfils the eligibility conditions imposed by the Minister under the Income Tax Act 1967 (**'ITA'**) and the 2022 Rules.

Rule 3 of the 2022 Rules provides that a new company must:

a. be incorporated under the Companies Act 2016 ('CA 2016') and resident in Malaysia;

b. have a paid-up capital of more than RM2,500,000 and

c. be established for the purpose of carrying on a qualifying activity, which: (i) does not have an existing entity or related entity in Malaysia prior to the application referred to in rule 2 being made; or (ii) has an existing entity or related entity in Malaysia which has not carried on a qualifying activity in Malaysia prior to the qualifying company's application for approval as a principal hub under the Scheme.

Rule 3 of the 2022 Rules provides that an existing company must:

a. be incorporated under the CA 2016 and resident in Malaysia;

b. already be operating in Malaysia and carrying on a manufacturing or services activity other than the qualifying activity prior to the qualifying company's application for approval as a principal hub under the Scheme; and

c. have a paid-up capital of more than RM2,500,000.

The rate of tax and the conditions as set out in Schedule 2 of the 2022 Rules are as follows:

Category of Qualifying Company	Category 1 (new company under rule 3 (i))	Category 2 (new company under rule 3 (ii))	Category 3 (existing company)
Income tax rate	0%	5%	10%
Conditions for a qualifying company under the Scheme.			
Minimum number of full-time new employees in Malaysia with a minimum basic salary of RM5,0000 pcm and at least 50% of the new employeesare Malaysians.	50 Persons	30 Persons	30 Persons
Minimum number of full-time new employees in Malaysia with a minimum basic salary of RM25,0000 pcm and at least 50% of the new employees are Malaysians.	5 Persons	4 Persons	5 Persons
Minimum amount of annual opertaing expenditure in Malaysia.	RM10 Million	RM5 Million	RM10 Million

To be eligible for the tax incentive under the 2022 Rules, a qualifying company must submit a written application under the Scheme to the Minister through MIDA and such application must be received on or after 1 January 2021 but no later than 31 December 2022.

The Minister may extend the specified YAs for a new company for a further period of five YAs subject to the new company fulfilling all conditions specified in Schedule 3 of the 2022 Rules and any other conditions imposed by the Minister in the approval letter. The application for extension by the new company must be in writing and be received by the Minister through MIDA within 30 days before the expiry of the specified YAs.

The conditions set out in Schedule 3 are shown in the table below.

Income derived from intellectual property from a qualifying activity shall not be included in ascertaining the statutory income of a qualifying company and the income derived from intellectual property shall be subject to tax under the ITA.4 In addition, the 2022 Rules shall not apply to a qualifying company which has made a claim for relief, exemption, deduction, or incentive under certain provisions of the ITA or the Promotion of Investments Act 1986.

Certain conditions for tax incentive for a principal hub under the 2022 Rules are more liberal that those under the predecessor subsidiary legislation, namely the Income Tax (Exemption) (No. 8) Order 2018 ('the 2018 Order'). In particular, a qualifying company was required, inter alia, to carry on three qualifying services under the 2018 Order, but is only required carry on one qualifying service to be eligible for tax incentives as a principal hub.

Prospective applicants for this incentive should also take note of the additional requirements set out in the Principal Hub Guidelines 3.0.

Category of Qualifying Company	Category 1 (new company under rule 3 (i))	Category 2 (new company under rule 3 (ii))
Income tax rate	0%	5%
Conditions for the extension of the specified YAs for a new company under the scheme.		
Minimum number of full-time new employees in Malaysia with a minimum basic salary of RM5,0000 pcm and at least 50% of the new employees are Malaysians.	60 Persons	36 Persons
Minimum number of full-time new employees in Malaysia with a minimum basic salary of RM25,0000 pcm and at least 50% of the new employees are Malaysians.	5 Persons	4 Persons
Minimum amount of annual opertaing expenditure in Malaysia (to be compleed with at the end of the last year of specific YAs).	RM13 Million	RM7 Million

Clarification on Zero VAT Rating[1]

Prior to the implementation of the Corporate Recovery and Tax Incentives for Enterprises Act (the CREATE Act), the Philippines adhered to the "cross-border doctrine", under which ecozones and freeport zones were considered foreign territories, even if they were situated within the Philippines. In effect, the sale of goods and services by a VAT-registered seller to registered enterprises in ecozones and freeport zones was treated as a constructive export subject to a VAT zero rating. According to the Philippine Bureau of Internal Revenue (BIR) in its recent Revised Memorandum Circular (RMC) No. 24-2022, the cross-border doctrine was rendered ineffectual and inoperative for VAT purposes under the CREATE Act. This appears to confirm the BIR's position that the cross-border doctrine will no longer apply, despite the fact that ecozones and freeport zones are recognised and managed as separate customs territories under the law creating them, and even though such provisions were not repealed by the CREATE Act.

Based on current law and regulations, only goods and services directly and exclusively used in the registered project or activity of a registered business enterprise (RBE) qualify for a VAT zero rating.

Under Revenue Regulations (RR) No. 21-2021, "direct and exclusive use in the registered project or activity" refers to such "raw materials, supplies, equipment, goods. packaging materials, services, including provision of basic infrastructure, utilities, and maintenance, repair and overhaul of equipment, and other expenditures" that must be "directly attributable to the registered project or activity without which the registered project or activity cannot be carried out". RMC No. 24-2022 further clarified that expenses for administrative purposes are excluded from the definition and that registered export enterprises should adopt a method for allocating local

[1] Courtesy SyCip Salazar Hernandez & Gatmaitan

purchases between those used in the registered export enterprise's registered project or activity and for administrative purposes. If the local purchases are used in both the registered export enterprise's registered project or activity and for administrative purposes and the proper allocation cannot be made, the local purchase will be subject to the 12% VAT.

RMC No. 24-2022 also defined the term "other expenditures" as costs that are "indispensable" to the project or activity, which include expenses that are necessary or required to be incurred depending on the nature of the registered project or activity of the export enterprise. The RMC expressly mentioned that services for "administrative expenses", such as legal, accounting and other related services, are not considered expenses directly attributable to, and exclusively used in, the registered project or activity. This appears to ignore the fact that some of these services, such as legal services, may be "indispensable" as defined under the RMC to the registered project or activity.

Notably, similar to the definition in the amendment to the implementing rules of the CREATE Act, RMC No. 24-2022 also uses the term "directly attributable" to describe what is meant by other expenditures that are "directly and exclusively used" in a registered export enterprise's registered project or activity. The use of the term "directly attributable to and exclusively used" appears to be less restrictive than the term "direct and exclusive use" and could cover a broader range of expenditures. However, the term "attributable" is not found in the CREATE Act. Thus, it is still unclear how the BIR will view the VAT treatment of local purchases during an audit if a registered export enterprise claims that a local purchase of goods or services is VAT zero-rated, as it is directly attributable to its registered project or activity, even if it is not directly and exclusively used in such project or activity.

For the purchase of goods or services to be zero-rated, prior to the transaction, a registered export enterprise purchaser must provide their suppliers with a photocopy of:

- Its BIR certificate of registration (BIR Form No. 2303);
- its certificate of registration and VAT certification issued by the concerned investment promotion agency; and
- a sworn declaration stating that the goods or services being purchased shall be used directly and exclusively in the registered export enterprise's registered project.

The supplier must also secure prior approval from the BIR in order that their sales to the registered export enterprises will be agreed the VAT zero rating. Without the prior approval of the BIR, the supplier runs the risk of having its VAT zero-rated sale subjected to VAT. The supplier will also be required to submit the approved application for VAT zero rating if it files a claim for refund of the input VAT under section 112(A) of the Tax Code.

In cases where VAT is erroneously passed on by a local supplier to a registered export enterprise, the latter can seek reimbursement from the former, and the previously issued invoice or receipt to the registered export enterprise must be returned to the local supplier for cancellation and replacement.

If VAT is paid or incurred for purchases not directly and exclusively used in the registered project or activity of the registered export enterprise, the registered export enterprise may:

- Claim the VAT as an input VAT credit under section 110 if it is also enjoying the income tax holiday incentive;
- file a claim for VAT refund upon expiration of its VAT registration if the registered export enterprise has no sales subject to VAT; or
- charge the VAT to a cost or expense account if it is non-VAT registered.

If the RBE is categorised as a domestic market enterprise (DME), it is not entitled to the VAT zero rating on its local purchases. Sales of goods or services to a registered DME are subject to 12% VAT. The registered DME may recover the input VAT by:

- deducting the input VAT against its output VAT if it is VAT-registered;
- filing a claim for a refund if it has zero-rated sales; or
- charging the VAT to a cost or expense account if it is not VAT-registered.

RMC No. 24-2022 also clarifies the VAT treatment for the sale of goods and services during the effectivity of RR No. 9-2021 (ie, from 27 June 2021 to 30 June 2021) and sales during the effectivity of RR No. 9-2021 but covered by the retroactive application of RR No. 21-2021 (i.e., from 1 July 2021 to 27 July 2021). RR No. 9-2021 implemented the provision in Republic Act No. 10963, or the Tax Reform for Acceleration and Inclusion Law (the TRAIN Law), subjecting to 12% VAT certain transactions that were previously subject to 0% VAT. Sales of goods and services that transpired from 27 June 2021 to 30 June 2021 are subject to 12% VAT. In the case of sales that transpired from 1 July 2021 to 27 July 2020, the seller and the purchaser have the option to treat the transaction as either subject to 12% VAT or revert the transaction from being subjected to 12% VAT to the zero rating.

It is expected that industries will welcome the BIR's efforts to remove uncertainties on the VAT treatment of transactions by registered export enterprises, and the transitory provisions and various issues pertaining to the applicability and coverage of VAT zero-rating transactions under RR No. 21-2021.

Nonetheless, registered export enterprises and their suppliers may still have concerns regarding the implementation of the changes to the VAT incentives brought about by the TRAIN Law and the CREATE Act with the issuance of RMC No. 24-2022. Registered export enterprises would likely wish to be able to use the VAT incentive and may be more inclined to argue that an expenditure qualifies for VAT zero rating, while suppliers may be more inclined to adopt a cautious approach since the wrong VAT treatment can result in deficiency VAT assessments against the suppliers. The RMC also does not provide much by way of guidance where a service incurred is arguably related or is attributable to a registered activity. For example, legal advice sought in connection with a lease contract of a registered export enterprise locating in an ecozone or research and development costs incurred for the enhancement of a registered project or activity would appear to be directly used in the registered business or activity of the enterprise. In the meantime, affected taxpayers will have to be guided by the rules and procedures set out in RMC No. 24-2022 to minimise non-compliance issues.

Tax Incentives for Prioritised Activities

On 24 May 2022, the Philippines president approved the 2022 Strategic Investment Priority Plan (SIPP). The SIPP, which is valid for 3 years, contains information on priority projects and activities, scope and coverage of location and industry tiers, and other information that the Board of Investments (BOI) may deem appropriate to include. Projects or activities under the SIPP may be granted tax incentives provided in the Corporate Recovery and Tax Incentives for Enterprises (CREATE) Act.

There are three tiers under the 2022 SIPP as provided under the CREATE Act:

Tier 1 adopts the activities listed in the 2020 Investment Priorities Plan (IPP), as amended. The 2020 IPP served as a transitional SIPP pending the issuance of the latter.

Tier 2 includes activities deemed to promote competitiveness and resilience and fill in gaps in industrial value chains. These include activities that promote green ecosystems (e.g. electric vehicle assembly, smart grid, renewable energy and bioplastics) and activities related to healthcare, national defence and food security.

Tier 3 includes activities projected to accelerate the transformation of the economy, primarily through the application of research and development (R&D) and attracting investments in technology. The list includes, but is not limited to, R&D and activities that adopt advanced digital production technologies of the fourth industrial revolution, highly technical manufacturing and production of innovative products and services, and activities that establish innovation support facilities.

Further details are available in Memorandum Order 61, s. 2022 of 24 May 2022. The Order was published in the Official Gazette on 26 May 2022.

JURISDICTION:

Singapore

Family Offices

Singapore has become a popular location for establishing one's family office. Often seen are structures where the family office holding vehicle is established in Singapore and is managed by a fund management company in Singapore owned by the same family which owns the family office holding vehicle. If properly established, these structures enable the family office investment vehicle to earn qualifying investment income free of income tax in Singapore while benefitting from Singapore's tax treaty network resulting in a lower overseas tax cost on the investment income.

On 11 April 2022, the Monetary Authority of Singapore issued a circular which tightens certain conditions which must be satisfied with effect from 18 April 2022 in order to establish a tax efficient family office investment structure in Singapore if it is managed by a fund management company without a CMS licence.

For Singapore Resident Funds (the so called s.13O Funds, which refers to the income tax law), the fund manager must manage one or more family offices (of the same family) with a total assets under management of at least SGD 10 million in the first year and SGD 20 million within two years. The fund management company must employ at least two qualifying Investment professionals and funds with assets under management of more than SGD 50 million but less than SGD 100 million must incur a total business spending anywhere in the world of at least SGD 500,000 per year. If the assets under management are more than SGD 100 million, the total business spending must be at least SGD 1 million per year. Furthermore, the fund must at any point in time invest at least 10% of its assets under management or S$10 million, whichever is lower, in qualifying local investments (either (i) equities listed on Singapore-licensed exchanges; (ii) qualifying debt securities; (iii) funds distributed by Singapore-licensed/ registered fund managers; and/or (iv) private equity investments into non-listed Singapore-incorporated companies (e.g., start-ups) with operating business(es) in Singapore.

For family investment holding companies qualifying as Enhanced Tier Funds (the so called s.13U Funds, previously known as s.13X), the same changes apply as set out above, except that the fund manager must employ at least three qualifying Investment Professionals and the total business spending must be incurred in Singapore.

Advance Tax Ruling on Transfer of Leasehold Property

On 1 June 2022 the IRAS published an advance ruling (advance ruling summary 9/2022) on the question whether gains derived from the transfer of a leasehold land, an office building, motor vehicles, furniture, fixtures and office equipment was taxable for income tax. The IRAS ruled that the transfer of the assets is a capital transaction and therefore the gains derived therefrom will not be taxable.

The facts of the case were the following. A Singapore-incorporated company was originally carrying on a trade in Singapore and was subsequently repurposed as an investment holding company. The company had acquired the leasehold land and office building more than a decade ago when it was still a trading company. After the company had become an investment holding company, the assets were sublet to derive passive rental income. Pursuant to the proposed group restructuring exercise, the company will be transferring the assets to a newly-incorporated company and will derive a gain from the said transfer. Following the transfer, the company will be liquidated.

The issue was whether the transfer of the assets to NewCo will be regarded as a revenue or capital transaction and, accordingly, whether the gains derived from the transfer will be taxable under the Income Tax Act.

The IRAS ruled that the transfer of the assets is a capital transaction and the gains derived therefrom will not be taxable under the ITA, having regard to the following considerations:

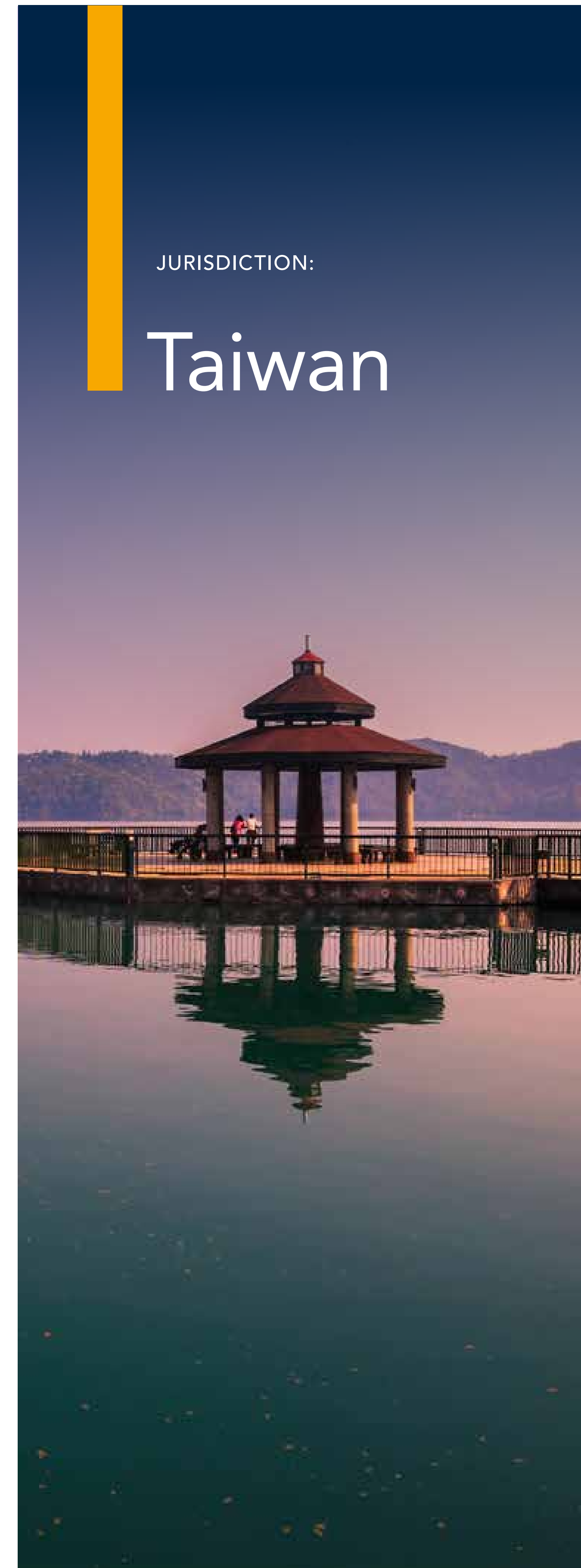
- The intention of the company at the point of acquiring the assets;
- the holding period of the assets;
- the frequency of similar transactions entered into by the company; and
- the circumstances of the realization of the assets.

Apart from the above factors which were explicitly acknowledged by the IRAS as having been taken into consideration in informing its decision, the IRAS will also consider the absence of (i) any supplementary work performed on the assets in question to enhance their value and (ii) short-term financing to fund the acquisition of these assets, as indicia of a lack of an intention to trade.

Tax Governance Programmes

IRAS has rolled out two new frameworks, the Tax Governance Framework (TGF) and the Tax Risk Management and Control Framework for Corporate Income Tax (CTRM), to guide companies to establish good tax governance and tax risk management essential for effective corporate governance. The TGF and CTRM will complement the existing Goods and Services Tax Assisted Compliance Assurance Programme (GST ACAP) to form a suite of voluntary compliance initiatives that companies can adopt holistically or as independent programmes, subject to their readiness and business needs.

Participation in the programmes provides taxpayers with the potential for lower penalties and generally greater leniency on the part of IRAS with respect to any tax oversights or errors.



JURISDICTION:

Taiwan

Goodwill and IP Amortization

The Ministry of Finance issued a tax ruling on 30 March 2022, No. 11004029020 in relation to amortizing goodwill for tax purposes. Until recently this topic continued to be a contentious matter. The Income Tax Act permits tax amortization in respect of the acquisition of patents, trademarks, copyrights and business rights granted by a government agency. The new tax ruling expands the scope of intangibles for tax deduction and contains a checklist of required supporting documents for the tax authorities' review.

According to the ruling, goodwill can be recognised for tax purposes if a company has a reasonable business purpose to merge with another company or acquire the business of another company in accordance with the law and the merger cost exceeds the net amount measured by the fair value of the identifiable assets acquired and liabilities assumed. In that case the fair value of identifiable net assets can be recognized as goodwill and amortized over a prescribed period. The ruling also expands the scope of intangible assets to include website names, client lists, customer contracts, rights for cultural and arts products, know-how, databases, software, designs, secret formula.

In order to claim the amortization, the company must provide documents such as due diligence reports, merger or acquisition agreements, proof of payment and appraisal reports to support the reasonable business purpose for the merger or acquisition, relevant merger or acquisition costs and the fair value of identifiable net assets, in order to substantiate the fair market values of tangible and intangible assets.

Tax Arrears and Legal Restrictions

Courtesy IBFD on 25 May it was reported that according to the amendment of paragraph 1.1, article 24 of the Tax Collection Act which was passed by Congress on 17 December 2021, where a taxpayer fails to make a tax payment, the tax

collection authorities may notify the competent authorities concerned to prohibit the taxpayer from transferring or creating other rights over the property of the taxpayer at a value equivalent to the amount of the outstanding tax payable. In order to ensure that the tax authorities apply a consistent standard for prohibition and cancellation of the disposal of property by taxpayers with tax arrears, the Ministry of Finance published Tax Decree, No. 11104581040 of 16 May 2022, to amend the relevant procedural rules.

If taxpayers can make full payment of the tax owed or provide sufficient collateral, they can ask for cancellation of the prohibition. The amended procedural rules provide taxpayers with the right to file an administrative remedy against the prohibition on disposal of property initiated by the tax authorities and request for cancellation of the prohibition according to the following rules:

- If the decision on the assessed tax case has been revoked by an appeal or an administrative litigation, the cancellation of prohibition will be processed within the scope of the revocation. However, after the revocation, the cancellation will not be processed if additional penalties are imposed on the taxpayer and the taxpayer has the intention of concealing or transferring property to evade the execution of taxes; and
- if a re-assessment has been revoked by an appeal or an administrative litigation, the excess amount of the tax payable will be cancelled after the taxpayers have been notified of the decision on the reassessment.

When the tax authorities notify the relevant competent authorities that the property disposition of the taxpayer is prohibited or the prohibition is cancelled, they must also notify the taxpayer with a letter stating the reasons and remedy procedures in accordance with the law.

JURISDICTION:

Thailand

Data Centres' VAT exemption

In a draft decree with the aim to promote Thailand as a hub for digital businesses, the Thai government is proposing to exempt data centre businesses with substantial investments in Thailand from the 7% value added tax (VAT).

Subject to satisfying the yet to be announced rules and conditions, the VAT exemption will apply to the following services provided by qualifying data centres:

- Provision of server space and related equipment for electronic storage, processing and connection via internet; and
- related services, e.g. disaster recovery sites, network connection services, cloud services, and system management and information security services.

Tax on the Sale of Listed Securities

Earlier this year there were reports that the government proposed to introduce a personal tax liability on the sale of listed securities. Similarly, there was a plan to charge 0.1% specific business tax on such transactions if the amount of the sale exceeds Baht 1 million. This has now been shelved.

Hence, the sale of securities in the Thai Stock Exchange is still exempt from personal income tax and specific business tax.

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