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Asia Tax Bulletin

Summer 2023

In This Edition

We are pleased to present the Summer 2023 edition of our firm's *Asia Tax Bulletin.*

Dear Reader,

Before you is the Summer 2023 edition of the Asia Tax Bulletin with a diverse range of tax matters that have changed.

Hong Kong passed the new tax incentive rules for qualifying family offices, which will give Singapore a run for its money to stay competitive. India's parliament passed the government's proposed tax changes announced in February, but made a few changes which you will read about in this edition of the bulletin. India also introduced new law which makes the issuance of shares above their real value taxable. Indonesia issued the new tax circular dealing with the taxation of benefits in-kind, which marks a change with the previous treatment, where they used to be non-taxable. It is still possible for certain types of benefits to be tax exempt but that will depend on their nature and the amount involved, which is discussed in this edition also. Malaysia replaced its previous transfer pricing rules by a new set of rules which also address the process and possibility of obtaining an APA (Advance Pricing Agreement) including a bilateral or multilateral pricing agreement. Interestingly, like Hong Kong, Singapore proposes, in response to a request from the European Union to amend its taxation rules for offshore gains of companies which are part of an international group with effect from 1 January 2024. The current safe harbour exemption in the income tax law will not apply to such situations anymore and care must be given that either the Singapore company who made the gain can treat the gain as not brought into Singapore (not remitted to Singapore nor deemed remitted) or that the company has sufficient economic substance. We will expect more news about this in the course of the year and similarly, Hong Kong will be announcing details about its tax changes on this subject in the coming months.

These and more topics are covered in this edition of the Asia Tax Bulletin. We hope you will find it of interest and look forward to hearing from you if you have questions or require assistance.

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Contents

JURISDICTION:

China (PRC)

E-tax system for non-resident enterprises

China's State Taxation Administration (STA launched a cross-border tax service for non-resident enterprises in April 2023, by adding a functional module in the nationwide online tax filing system, i.e., E-tax China, through which overseas enterprises can directly register for tax, make filings and attend to settlement online for domestic equity transfers.

"Non-resident enterprise" refers to an enterprise which is established and actually managed in a jurisdiction other than China, either having an office or premises established in China, or having income derived from China but with no office or premises therein. The new function supports both Chinese and English and is specifically applicable to non-resident enterprises which obtain equity transfer income from non-listed companies (not including restricted shares) in China with no withholding agents and need to file enterprise income tax ("EIT") and stamp duty per occurrence on their own. The E-tax system provides services such as contract information collection, intelligent judgment of tax obligations, tax calculation, and cross-border tax payment.

With the launch of the new functions in E-tax system, non-resident enterprises can register for tax using a valid E-mail address and then upload certificates for verification. After verification, they will obtain their unique taxpayer identification numbers, which enable them to register, declare and pay taxes online with nationwide applicability. This is a novel and much anticipated service.

The new functions launched in the E-tax system should save overseas taxpayers the burden of on-site visits and tax filings to some extent. However, proactive communications with the in-charge tax authority beforehand are still inevitable because:

- notwithstanding the fact that tax filings can be submitted in the E-tax system, it is still necessary for foreign taxpayers to discuss with the tax authority the pathways to make cross-border tax payments unless the taxpayer can use UnionPay for tax settlement.
- Although the pre-filing review and approval by the tax authority are not legally required under the current regime, given the immaturity of online tax payment function and tax filing experience generally, it is still important to communicate with the tax authority beforehand and to reach a consensus on the pertinent matters to secure tax certainty for the overseas taxpayers, such as the reasonableness of the equity transfer price and the tax basis therein.

It is also important to note that E-filing is not applicable if the taxpayer wishes to claim the special tax treatment granted to overseas taxpayers under STA Bulletin [2013] No. 72, or if the taxpayer would like to claim tax treaty benefits under a tax treaty/arrangement signed by China with the taxpayer's home tax jurisdiction. Accordingly, it is still necessary for taxpayers with such needs to make on-site visits to the in-charge tax authority.

Tax-related proposals at the 14th National People's Congress

At its first session on 13 March 2023, the 14th National People's Congress approved the National Economic and Social Development Plan of Year 2023 ("2023 Plan"), deciding to extend or optimize the existing tax and fee cut policies. Further to the 2023 Plan, at an executive State Council meeting chaired by the newly nominated Premier Li Qiang on 24 March 2023, China's State Council announced the extension or renewal of a range of supportive tax and fee cut policies.

Increase of the super-deduction ratio for R&D expenses.

To further encourage investment in R&D activities and to better support sci-tech innovation, the existing pre-tax additional deduction ratio of R&D expenses for eligible companies has been increased from 75% to 100%. Additionally, the newly introduced policy will be implemented as a long-term incentive scheme with no expiration date specified.

Extension of the zero-tariff policy for coal imports.

The provisional zero-tariff policy for the importation of coal has been further extended by the Customs Tariff Commission of the State Council. Such policy was to expire on 31 March 2023 and has now been extended to 31 December 2023. The zero-tariff policy for coal importations was first introduced in April 2022 to strengthen the security of energy supply in response to the overseas inflation of coal prices.

Extension of the incentive policy of urban land use tax for logistics enterprises.

For logistic enterprises, the policy of half-reduced urban land use tax on land used for qualifying bulk commodity storage facilities, which was introduced to promote the development of logistic industry and initially set to expire at the end of 2022, will be extended to the end of 2027. From 1 January 2023 to 31 December 2027, the urban land use tax on land used or leased out by a logistics enterprise for storage facilities (owned or leased) for the purpose of storing commodities traded in large quantities will be reduced by 50%. A logistics enterprise is defined as an enterprise engaged in warehousing storage and transportation services and registered as such. Commodities in large quantities include grain, cotton, oil, sugar, fruits, meat, seafood, fertilizer, coal, raw oil, ferro or non-ferro metals, plastic, construction materials and so on. To be eligible for the reduction, the surface of the facilities must exceed 6,000 square metres. This reduction is laid down in Announcement of the Ministry of Finance and the State Taxation Administration [2023] No. 5.

JURISDICTION:

Hong Kong

Family office holding companies

The Government welcomed the passage of the Inland Revenue (Amendment) (Tax Concessions for Family-owned Investment Holding Vehicles) Bill 2022 (the Bill) by the Legislative Council on May 10, 2023. The Bill amends the Inland Revenue Ordinance (Cap. 112) to provide profits tax concessions for eligible family-owned investment holding vehicles (FIHVs) managed by single family offices (SFOs) in Hong Kong.

The Bill exempts a FIHV's assessable profits earned from qualifying transactions and incidental transactions from payment of profits tax. To attain the policy objective of bringing investment management and related activities to Hong Kong, the FIHV shall be managed by an eligible SFO and fulfil the minimum asset threshold of $240 million and substantial activities requirement.

The Bill as passed has become effective upon gazettal on May 19. The tax concession are applicable to any years of assessment commencing on or after April 1, 2022.

Policy statement on developing family office businesses in Hong Kong

The Hong Kong Government in April issued the Policy Statement on Developing Family Office Businesses in Hong Kong, setting out its policy stance and measures with a view to creating a conducive and competitive environment for the businesses of global family offices and asset owners to thrive in Hong Kong.

- A new Capital Investment Entrant Scheme (CIES): based on the original CIES, permissible assets for the scheme will include equities listed in Hong Kong, debts issued or fully guaranteed by companies listed in Hong Kong, by the government or by other entities wholly or partly owned by the government, subordinated debts issued by authorized institutions, and eligible collective investment schemes (including the investment-linked assurance scheme (ILAS)). Besides assets denominated in Hong Kong dollars, assets denominated in Chinese RMB will also be considered. Upon approval, applicants may reside and pursue development in Hong Kong along with their spouse and dependent unmarried children.
- Family owned investment holding vehicles (FIHVs) managed by single family offices in Hong Kong will be exempt from profits tax, and existing preferential tax regimes for funds and carried interest will be further reviewed.
- Providing market facilitation measures: the Securities and Futures Commission (SFC) has issued quick reference guides to address frequently asked questions about licensing requirements, with one specifically catering for family offices, and has also set up a dedicated communications channel maintained by its licensing team for family office related enquiries. The government will also introduce a set of more risk-based measures to streamline intermediaries' suitability assessment and disclosure processes for sophisticated or ultra-high-net worth individual clients, with due regard to investor protection.
- the government will fund the setup of a new Hong Kong Academy for Wealth Legacy under the Financial Services Development Council.
- Art storage facilities at the airport will enable global family offices with capital allocations in art to benefit from the thriving art ecosystem in Hong Kong.
- Aiming at developing Hong Kong into a philanthropic centre for global family offices and philanthropists to deploy charitable capital benefiting Hong Kong, China and elsewhere, the government will enhance the processing of applications for the recognition of tax exemption status for charities. The Inland Revenue Department (IRD) will devise a standard form to facilitate the submission of applications and streamline their processing, provide further guidance for applicants to facilitate precise statements of charitable objects and enhance the legislative proposal by expanding the extent of beneficial interest that an exempted charity may hold in an FIHV.
- The dedicated FamilyOfficeHK team in InvestHK will expand its role to also cover services like facilitating philanthropic endeavours of wealth owners and assisting in education related matters.
- A new Network of Family Office Service Providers, covering private banks, accounting and legal firms, trusts and other professional services firms, will provide a two-way channel between the government and the industry to communicate on the latest policy developments, and mobilize the industry's global network to advocate and promote opportunities in Hong Kong for family offices.

Stamp duty refunds under the designated talent admission schemes

Hong Kong is proposing a refund mechanism under the Buyer's Stamp Duty (BSD) and New Residential Stamp Duty (NRSD) regimes for non-Hong Kong permanent residents (non-HKPRs) who have entered Hong Kong under designated talent admission schemes, purchased a residential property in Hong Kong on or after 19 October 2022, and subsequently become HKPRs. This measure is aimed at attracting incoming talents to stay in Hong Kong for long-term development by substantially reducing their acquisition cost of properties. However, the ad valorem stamp duty at Scale 2 rates (i.e. the rates applicable to first-time home buyers who are HKPRs) will still be payable. The Stamp Duty (Amendment) (No. 2) Bill 2023 was gazetted on 6 April 2023.

Economic Substance Requirement

On 22 May 2023, the Inland Revenue Department (IRD) published an advance tax ruling (Advance Ruling Case No. 69) that illustrates the application of section 15K of the Inland Revenue Ordinance (IRO), which provides an exception to the tax treatment of specified foreign-sourced passive income under the foreign-sourced income exemption (FSIE) regime where the economic substance requirement is met.

Briefly, the FSIE regime that became effective from 1 January 2023 subjects specified foreign-sourced income to profits tax if the income is received in Hong Kong by a multinational entity (MNE) carrying on a trade, profession or business in Hong Kong unless economic substance, nexus and/or participation requirements are met. The ruling focuses on the economic substance requirement and applies for the years of assessment 2023/24 to 2027/28.

The Applicant is a private limited company incorporated in Hong Kong and an MNE entity as defined under the IRO. It holds 20% equity interests in Company F (a company incorporated in Jurisdiction F) from which it derives offshore dividend income but is not a pure equity-holding company. The principal business activities of the Applicant are sales of hospitality packages for sporting events and investment holding.

- The Applicant carries out or arranges to carry out its specified economic activities in Hong Kong, i.e. making necessary strategic decisions in respect of assets it acquires, holds or disposes of and managing and bearing principal risks in respect of the relevant assets.
- The Applicant has several directors and employees in Hong Kong to manage and support its business operations. It also outsources its legal and business support activities to a non-associated service provider in Hong Kong.
- Apart from its principal business activities, the Applicant has advanced two interest-free loans to its related parties in Hong Kong and bears principal risks of the loans. The loan transactions have already occurred and have been made within the same multinational enterprise group, hence minimal activities are required by the Applicant to manage the loans. The relevant activities in relation to overseeing the loans are carried out by the Applicant's director in Hong Kong.
- The Applicant has planned to:
  - » have a predetermined number range of employees with the necessary qualifications to carry out the specified economic activities in Hong Kong each year;
  - » incur a predetermined amount range of annual operating expenditures in Hong Kong for the specified economic activities; and
  - » undertake adequate monitoring of the specified economic activities carried out in Hong Kong by the service provider.

The IRD has ruled that the Applicant will satisfy the economic substance requirement under section 15K of the IRO. Advance Ruling Case No. 68 was also published on 22 May 2023, with similar facts and arrangements and also ruled as satisfying the exception requirement.

Tax exempt charities

The IRD updated its website on the 9th of June 2023 to provide information on the new procedures on application for recognition of tax exemption status under section 88 of the Inland Revenue Ordinance and the potential profits tax liabilities for tax-exempt charities.

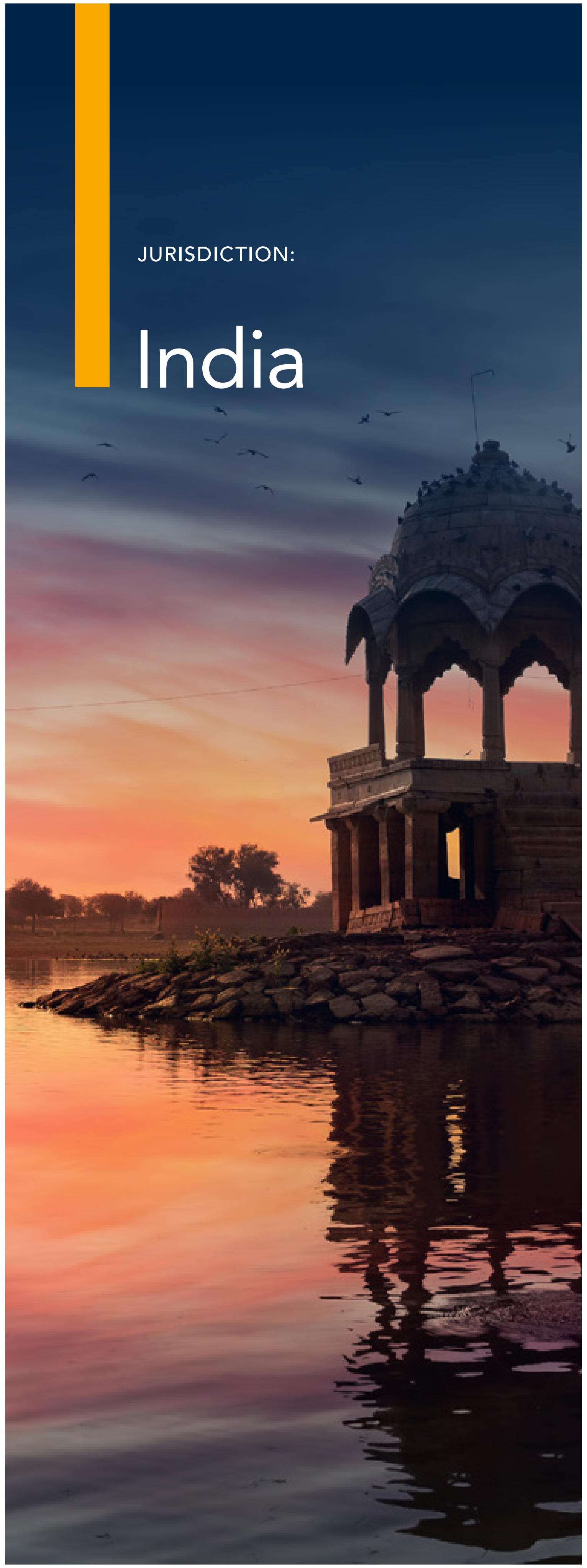
Organisations wishing to seek recognition as tax-exempt charities are now required to submit an application form together with the documents specified therein. Guidance on writing charitable purposes in the governing instrument is also provided to assist organisations in preparing their governing instruments.

Aircraft leasing

The IRD mentioned on the 9th of June 2023 that the Departmental Interpretation and Practice Notes No. 54 has been updated to clarify that a beneficial owner of an aircraft under a bare trust arrangement would be entitled to the tax concessions under the aircraft leasing regime provided that the specified conditions are satisfied.

International tax developments

Mauritius. The Comprehensive Avoidance of Double Taxation Agreement with Mauritius signed in November 2022 came into force on June 23, 2023 after the completion of the relevant ratification procedures. The treaty will have effect in respect of Hong Kong tax for any year of assessment beginning on or after April 1, 2024.



JURISDICTION:

India

Cost inflation index for capital gains

On 12 June 2023, the Central Board of Direct Taxes (CBDT) issued notification 39/2023 determining the cost inflation index at 348 for the financial year (FY) 2023-24. The notification will come into force from 1 April 2024. The cost inflation index for FY 2022-23 is 331.

The cost inflation index is used to calculate capital gains on sales of long-term capital assets to account for inflation between the year of acquisition of the asset and its sale. Certain assets or taxpayers may not be eligible for the benefit of the cost inflation index.

Turnover threshold for GST E-invoicing reduced

On 10 May 2023, the Central Board of Indirect Taxes and Customs (CBIC) issued a notification mandating businesses with a turnover of INR 50 million or more to issue e-invoices for business-to-business (B2B) transactions beginning 1 August 2023. Currently, the requirement is applicable to businesses with a turnover of INR 100 million.

For this purpose, if the turnover of the business for any of the 5 preceding years (viz. financial years 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22) exceeds the limit of INR 50 million, the requirement to generate e-invoices applies from 1 August 2023.

E-Appeals Scheme

On 16 June 2023, the Central Board of Direct Taxes issued an order determining the scope of the e-Appeals Scheme 2023 and the exclusions to it.

The order outlines the appeals that will not be considered under the e-Appeals Scheme, as follows:

- appeals against assessment orders passed before 13 August 2020 under sections 143(3) or 144, and having disputed demand of more than INR 1 million;
- appeals against specified penalty orders passed before 12 January 2021, and having disputed demand of more than INR 1 million;
- appeals against assessment under cases of search;
- appeals under faceless assessment or faceless penalty; and
- appeals pertaining to international tax assessments.

The order also defined "disputed demand" as follows (disputed demand includes the applicable interest, surcharge and cess):

- the difference between the tax on the total income assessed and the tax on the returned income, if filed;
- tax on the total income assessed where no return has been filed;
- for a penalty order, the amount of penalty imposed; and
- demand raised vide notice or intimation issued, in any other case.

Government's Tax Budget changes for 2023

The Finance Bill 2023 was recently passed by the Lok Sabha (lower house)and the Rajya Sabha (upper house), incorporating changes in the Finance Bill introduced by the Finance Minister on 1 February 2023. The key amendments, in respect of income tax, in the Finance Act 2023 are as follows.

Marginal relief to resident individuals opting for new scheme

A rebate will be available to resident individuals opting for the new individual income tax scheme if the total income during the previous year did not exceed INR 700,000. Furthermore, the amended Finance Act provides a marginal rebate to resident individuals whose income marginally exceeds INR 700,000.

Clarity on capital gains from debt mutual funds

Debt mutual funds lose their long-term capital gains (LTCG) tax benefit if less than 35% is invested in equity instruments. Hence, any income or gain from sales, redemptions or maturities from these funds will be considered short-term capital gains and taxed at the applicable tax slab of the investor, regardless of the investment's holding period.

Change in tax rates on specified income

The amended Finance Act provides the following tax rate changes:

- a concessional tax rate of 10% on dividends (normally 20%) received from an International Financial Services Centre (IFSC) Unit by a non-resident or foreign company; and
- royalty and fees for technical services received by a non-resident or foreign company are to be taxed at 20% (previously 10%).

Applicability of tax deduction at source (TDS) on online gaming winnings from 1st April 2023

The Finance Act brought forward the applicability of the 30% TDS on winnings from online gaming from 1 July 2023 to 1 April 2023.

Expansion of meaning of original funds for providing exemption from capital gains

An investment vehicle in which the Abu Dhabi Investment Authority is the direct or indirect sole shareholder, unit holder, beneficiary or interest holder and such investment vehicle is wholly owned and controlled, directly or indirectly, by the Abu Dhabi Investment Authority or the government of Abu Dhabi shall be eligible for exemption on the transfer of capital assets to the resultant fund formed in India.

Exemption from capital gains on transferring interest in a joint venture (JV)

The transfer of interest in a JV by a public sector company in exchange for shares in a foreign company shall not be considered as transfer and hence is exempted from capital gains tax.

Unit of IFSC may opt for tonnage tax scheme after claiming income-based deduction

The Finance Act allows a unit of an IFSC that has claimed the income-based deduction benefit to make an application to opt for a tonnage tax scheme within 3 months from the date such income-based deduction benefit ceases.

No surcharge and cess on income from securities held by specified fund

In respect of income from securities held by a specified fund referred to in section 10(4D), no surcharge and cess shall be levied on income tax calculated on the same. This amendment shall be applicable from 1 April 2023.

Tax to be collected at source if remittance under liberalized remittance scheme is made within India

Tax collection at source (TCS) shall be applicable in relation to remittance under the Liberalized Remittance Scheme (LRS), even if the remittance is made within India, at the rate of 20% with effect from 1 July 2023.

Maximum rate of TCS shall be 20%

The maximum rate of TCS has been capped at 20% in case of persons not having a valid permanent account number (PAN) and non-filers of returns of income.

Introduction of new rate of TDS

Tax shall be deducted at the rate of 9% on sums paid by way of interest on money borrowed from a source outside India by issuing a long-term bond or rupee denominated bond, which is listed only on a recognized stock exchange located in an IFSC, on or after 1 April 2023.

Exemption on income received by non-resident from portfolio of securities

Income received by a non-resident from a portfolio of securities or financial products or funds, managed or administered by any portfolio manager on behalf of such non-resident, in an account maintained with an offshore banking unit in any IFSC is exempt from income tax.

Benefits in respect of shares of a domestic company engaged in aircraft leasing

With effect from 1 April 2023, the Finance Act exempts income earned by a non-resident or a unit of an IFSC on the transfer of shares of a domestic company engaged in aircraft leasing, subject to the fulfilment of certain conditions. The dividend received by an IFSC unit engaged in aircraft leasing business shall be exempt, provided that the company paying the dividend is also an IFSC unit engaged in aircraft leasing business.

Taxability of specified sum received from business trust

The Finance Act provides that a "specified sum" shall be computed as per the computation mechanism provided in the Act, in order to bring the sums received by a unit holder from a business trust into the ambit of taxation. Further, with effect from 1 April 2023, the cost of acquisition of a unit shall be reduced by any sum received from the business trust, subject to specified conditions.

Dependent agent

The Bangalore Tribunal, in the case of *M/s. Google India Private Ltd. v. ACIT* (ITA No.374 & 362/ Bang/2013), ruled that M/s. Google India Private Ltd. (the taxpayer) was not a dependent agent of its Irish Associated Enterprise (AE) and hence, no withholding tax deduction was required in India.

The taxpayer and AE Google Ireland Ltd. (GIL) entered into an agreement for marketing and distribution of the AdWord programmes. Of the total amount received from advertisers, the taxpayer paid approximately INR 1.19 billion as distribution fees to GIL without deducting any withholding tax (WHT). The tax authority argued that distribution fees were taxable in India as GIL constituted a dependent agent permanent establishment (DAPE) of the taxpayer in India and accordingly, that the taxpayer should have deducted WHT. Accordingly, the tax authority sought to disallow the deduction of distribution fees to the taxpayer.

The Bangalore Tribunal, however, ruled in favour of the taxpayer on the grounds that it was not a DAPE of GIL in view of the clauses in the distribution agreement between the taxpayer and GIL, the invoices raised on advertisers and articles 5(6) and 5(8) of India-Ireland Income Tax Treaty (2000). Further, no WHT deduction was required on distribution fees paid by the taxpayer to GIL and therefore, no disallowance was warranted. The Court further held that the distribution fees, alternatively, could not be considered as royalty/ fees for technical services considering that the issue was already settled in the taxpayer's previous case.

The relevant clauses of the distribution agreement between the taxpayer and GIL are laid out below.

- GIL appointed the taxpayer as a "distributor" of Google's Adwords programme in India and the taxpayer would conduct business on its own account (not as a franchisee, agent, employee, or partner of GIL).
- The taxpayer would market and distribute the programme with its commercial expertise, own sales force, customer service infrastructure and also provide after-sales services.
- GIL and the taxpayer shall be independent contractors and neither of them has an authority or obligation towards the other.

Management service fees not subject to withholding tax under the UK treaty

Courtesy IBFD, it was reported that on 26 May 2023, the Delhi Income Tax Appellate Tribunal (ITAT), in the case of *Infobip Limited v. Assistant Commissioner of Income Tax (ITA No. 820/Del/2022),* ruled that services rendered by the taxpayer to its associated enterprise (AE) do not satisfy the "make available" clause as envisaged under article 13(4)(c) of the India-UK Income Tax Treaty (the Treaty) to fall within the scope of fees for technical services (FTS).

The taxpayer was a tax resident of the United Kingdom (UK) and opted to be governed by the beneficial provisions of the Treaty. The taxpayer provided services to its AE, namely bSmart Tech Pvt. Ltd. (BTPL) under the Business Cooperation Agreement. The taxpayer rendered centralized services to BTPL, which were in the nature of financial support services, technical support services, sales support services and legal support services, based out from London, the UK.

The consideration received for providing services to BTPL was not offered to tax by the taxpayer. However, the tax authorities sought to tax the said fees as FTS under section 9(1)(vii) of the Income Tax Act, 1961 (the Act) and article 13 of the Treaty.

The ITAT rejected the tax authorities' arguments and held as follows:

- The services provided by the taxpayer includes administrative services, accounting services, legal services and other support services that are ancillary to the functioning of the corporate management function of BTPL. These services are provided by the taxpayer year after year on a continuous basis, which shows that the taxpayer cannot perform these services on its own without recourse to the taxpayer. These services are thus, essentially in the nature of managerial services which are outside the scope of the meaning of FTS under article 13(4) of the Treaty.
- Even if the above services are considered to be FTS, being technical, managerial and consultancy services, as per the provisions of section 9(1)(vii) of the Act, these services will not fall within the meaning of FTS under article 13(4) of the Treaty as the services provided by the taxpayer to BTPL do not make available any technical knowledge/experience, skill, know-how or processes or transfer any technical plan/design enabling BTPL to apply the embedded technology.
- The mere rendering of services is not considered as "make available" unless the person utilizing the services is able to make use of the technical knowledge etc. by himself in his business or for his own benefit and without recourse to the performer of services in the future.
- Thus, the services rendered by the taxpayer to BTPL do not satisfy the "make available" clause under the Treaty and hence, the said fees are not taxable in India under the Treaty.

No Tax Collection at Source on International Debit/Credit Cards

On 28 June 2023, the IBFD reported that the Ministry of Finance issued a press release postponing indefinitely the application of tax collected at source (TCS) on payments through international debit/credit cards under the Liberalized Remittance Scheme (LRS) (scheduled to apply from 1 July 2023).

The Ministry further clarified that *"transactions through international credit cards while being overseas would not be counted as LRS and hence would not be subject to TCS"*.

Likewise, the application of revised TCS rates has also been postponed to 1 October 2023 (from 1 July 2023).

Section 206C(IG) of the Income Tax Act, 1961 provides for TCS on (i) foreign remittance through LRS; and (ii) sale of overseas tour program packages. The Finance Act, 2023 amended this section and increased the rate of TCS from 5% to 20% for remittance under LRS as well as for purchase of overseas tour program packages and removed the threshold of INR 700,000 for triggering TCS on LRS. These two changes are not applicable when the remittance is meant for education or medical purposes. These amendments will now take effect from 1 October 2023.

Reimbursement of expenses not subject to withholding tax

The Chennai Income Tax Appellate Tribunal (ITAT) has held that, in the case of *Deputy Commissioner of Income Tax v. M/s. Trusted Aerospace Engineering Pvt. Ltd. (ITA. No. 473/Chny/2019),* payments made by the taxpayer to its non-resident sister company did not involve any income element. Accordingly, there is no requirement to deduct withholding tax under section 195 of the Income Tax Act, 1961, and the payment was an allowable expense for the taxpayer.

The issuance of shares can be taxable if price not at arm's length

On 19 May 2023, the Ministry of Finance issued a press release proposing modification to the valuation rules for investment by non-residents in equity shares of a closely held company. The press release also proposes to notify certain entities outside the purview of such valuation section 56(2)(viib) of the Income Tax Act, 1961 (the Act).

The Finance Act 2023 introduced a provision in section 56(2) (viib) to tax the consideration received from non-residents for the issuance of shares of a closely held company. The section provides that if such consideration for the issuance of shares exceeds the fair market value (FMV) of the shares, the excess will be taxable (known as the 'angel tax').

The press release proposes:

- to include five more valuation methods, for non-resident investors, in addition to the current discounted cash flow (DCF) and net asset value (NAV) methods of valuation;
- price protection for any non-resident entity notified by the government;
- availability of price matching for resident and non-resident investors, with reference to investment by Venture Capital Funds or Specified Funds;
- acceptance of a merchant banker's valuation, provided the report is not older than 90 days;
- provide a 10% variation in value to account for forex fluctuations, bidding processes and variations in other economic indicators, etc., which may affect the valuation of the unquoted equity shares during multiple rounds of investment; and
- relaxation for non-residents investing in start-ups meeting the specified conditions.

The press release further proposes to exclude the following non-resident entities from the applicability of the angel tax:

- government and government related investors;
- banks and insurance companies;
- entities registered with the Securities and Exchange Board of India as Category-I Foreign Portfolio Investors;
- endowment funds associated with a university, hospital or charity;
- pension funds created or established under the law of a foreign country or specified territory; and
- broad based pooled investment vehicles or funds where the number of investors in such vehicle or fund is more than 50 and such fund is not a hedge fund or a fund which employs diverse or complex trading strategies.

On 24 May 2023, the Ministry of Finance issued Notifications 29/2023 and 30/2023 enacting exemptions from the Angel Tax. Notification 29/2023 provides that section 56(2) (viib) does not apply to the following classes of persons:

- government and government related investors such as central banks, sovereign wealth funds, international or multilateral organizations or agencies including entities controlled by the government or where direct or indirect ownership of the government is 75% or more;
- banks or entities involved in insurance business where such entity is subject to applicable regulations in the country where it is established or incorporated or is a resident; or
- any of the following entities, which are a resident of a specified country/territory and are subject to applicable regulations in the country where they are established or incorporated or are a resident:
  - » entities registered with the Securities and Exchange Board of India as Category-I Foreign Portfolio Investors;
  - » endowment funds associated with a university, hospital or charity, or pension funds created or established under the law of a foreign country or specified territory; or
  - » broad based pooled investment vehicles or funds where the number of investors in such vehicle or fund is more than 50 and such fund is not a hedge fund or a fund which employs diverse or complex trading strategies.

For this purpose, the notification provides a list of 21 countries/territories: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Iceland, Israel, Italy, Japan, Korea, New Zealand, Norway, Russia, Spain, Sweden, the United Kingdom and the United States of America.

Notification 30/2023 provides that section 56(2) (viib) of the Act does not apply to consideration received by a company from any person for the issuance of shares, which exceeds the face value of such shares, if the company fulfils the conditions specified by the Department for Promotion of Industry and Internal Trade (DPIIT) and files a declaration to that effect.

JURISDICTION:

Indonesia

International tax collection

The Minister of Finance (MoF) issued PMK-61 to stipulate procedures for the collection of tax liabilities. PMK-61 is effective from 12 June 2023 and revokes PMK-189. PMK-61 elaborates on the procedures for implementing tax collection in cooperation with Treaty Partner Jurisdictions to include: i. a request for tax collection assistance; or ii. a provision of tax collection assistance (i.e. collection of "Tax Claims"). Tax Claims are defined as legal instruments from a Treaty Partner Jurisdiction in relation to their request for tax collection assistance. Other than detailed procedures on correspondence with authorised officials in Treaty Partner Jurisdictions, the procedures for tax collection assistance on Tax Claims is generally the same as the procedure for domestic tax collection efforts.

Taxation of benefits in kind

The Minister of Finance (MoF) issued PMK-66 concerning the income tax treatment of benefits in kind paid to employees by employers ("BIKs"). PMK-66 is effective from 1 July 2023

BIKs are tax deductible if they represent a reimbursement/compensation related to (i) employment relationships between employers and employees or (ii) service transactions between taxpayers. BIK costs that have a useful life of less than one year are expensed in the year where the expense is incurred. BIK's that have a useful life of more than one year are expensed through depreciation or amortisation.

GR-55 stipulates that withholding tax obligations for employers are applicable for BIKs received, starting from 1 January 2023. However, PMK-66 stipulates that where tax has not been withheld by the employer on BIKs received from January to June 2023, the tax must be calculated, paid, and reported by employees in their 2023 Annual Income Tax Return.

Based on GR-55 the following are non-taxable BIKs for employees: (i) F&Bs provided to all employees (i.e. F&B coupons for employees who, due to the nature of their work, cannot enjoy the F&B provided by the employer at the workplace, i.e. employees of the marketing and transportation departments as well as other out-of-office employees; PMK-66 defines coupons as non-money transaction tools that can be exchanged for F&Bs, including reimbursement of F&B expenses which is borne in advance by employees subject to the following threshold: IDR 2 million/month per employee or the monthly expense per employee for F&B provided by the employer at the workplace, if the amount exceeds IDR 2 million/month per employee - the excess of the actual coupon value after deducting the value as mentioned above is an Income Tax object), (ii) BIKs provided by employers located in certain areas (the provisions of BIKs in certain underdeveloped areas ("remote area") were previously regulated in PMK-167; as PMK-66 revokes PMK-167, most of the content of PMK-167 and previous implementing regulations (i.e. PER-515) are accounted for in PMK-66 with minor updates. The definition of remote area, the types of non-taxable BIKs, as well as the types of infrastructure that are used as an indicator in the determination of remote area, remain the same, with one clarification: at least six out of the eleven types of infrastructure stipulated as indicators must be unavailable or unfit for an area to be determined as a remote area), (iii) BIKs necessary to carry out the employees' work activities, (iv) BIKs sourced or financed from the regional/state revenue budget and (v) BIKs of certain types and below specified thresholds, which are specified in the table below:

No.	Type of BIKs	Threshold/ requirements
1	Gifts from the employer for religious holidays, i.e. Eid al-Fitr, Christmas, Nyepi, Vesak, or Chinese New Year	Received or earned by all employees
2	Gifts from employers that are given other than for religious celebrations	• Received or earned by all employees
3	Work equipment and facilities from employers, including computers, laptops, or cellular phones and their related costs such as phone credit or internet connection	• Received or earned by employees; and • Support employee's work
4	Health and medical treatment facilities from the employer	• Received or earned by employees; and • Provided for handling: 1) work accident; 2) occupational diseases; 3) life-saving emergencies; or 4) follow-up care and treatment due to work accidents or occupational diseases
5	Sports facilities from the employer, other than golf, horse racing, motorised boat racing,gliding, and/or automotive sports	• Received or earned by employees; and • Maximum IDR 1.5 million/year per employee
6	Communal residential facilities from employers, including dormitories, lodges, or barracks	Received or earned by employees
7	Residential facilities from employers whose utilisation rights are held by individuals, including apartments/landed houses	• Received or earned by employees; and • Maximum IDR 2 million/month per employee
8	Vehicle facilities from employer	Received or earned by employees who: • do not have capital investment in the employer; and • have an average gross income of maximum IDR 100 million/month in the last 12 months from the employer
9	Employer-borne contribution to pension funds approved by the Financial Services Authority (Otoritas Jasa Keuangan)	Received or earned by employees
10	Religious facilities, including prayer rooms, mosques, chapels, or temples	Intended solely for religious activities
11	All BIKs received in 2022	Received or earned by employees/service providers

[1] Under PMK-167, the remote area approval period can be granted by the Directorate General of Taxes (DGT) for ten and five years for certain mining licence holders (mining) and non-mining taxpayers, respectively. This approval can be extended for another ten and five years with another application by the taxpayers. Under PMK-66, the approval and extension procedures for non-mining taxpayers remain the same. However, the approval for mining taxpayers is now granted in stages every five year up to the expiry date of the mining licence, where the extension is conducted ex-officio by the DGT without application from the taxpayers.

If the BIK involves goods originally intended to be traded by the provider, the taxable value is based on (i) market value for land and/or buildings ("L&B") or (ii) cost of goods sold for BIKs other than L&B.

If the BIK has a utilisation period of more than one month, the determination of taxable value is carried out every month during the utilisation period.

JURISDICTION:

Korea

Tax credit for National Strategic Technology Investments

Korea amended its recently increased tax credits for investment in national strategic technologies.

The scope of national strategic technology investments eligible for tax credit benefits will be expanded to include: (i) five additional technologies and three additional facilities for the future means of transportation sector, such as electric vehicle production facilities and electric vehicle charging technologies and facilities; and (ii) five additional technologies and five additional facilities for the hydrogen sector, such as water electrolysis-based clean hydrogen production technologies and facilities.

Companies investing in these newly added technologies or facilities (i.e. making qualified national strategic technology investments) will be eligible to claim up to 25% (large or medium-sized companies) or 35% (small and medium-sized companies) in tax credits.

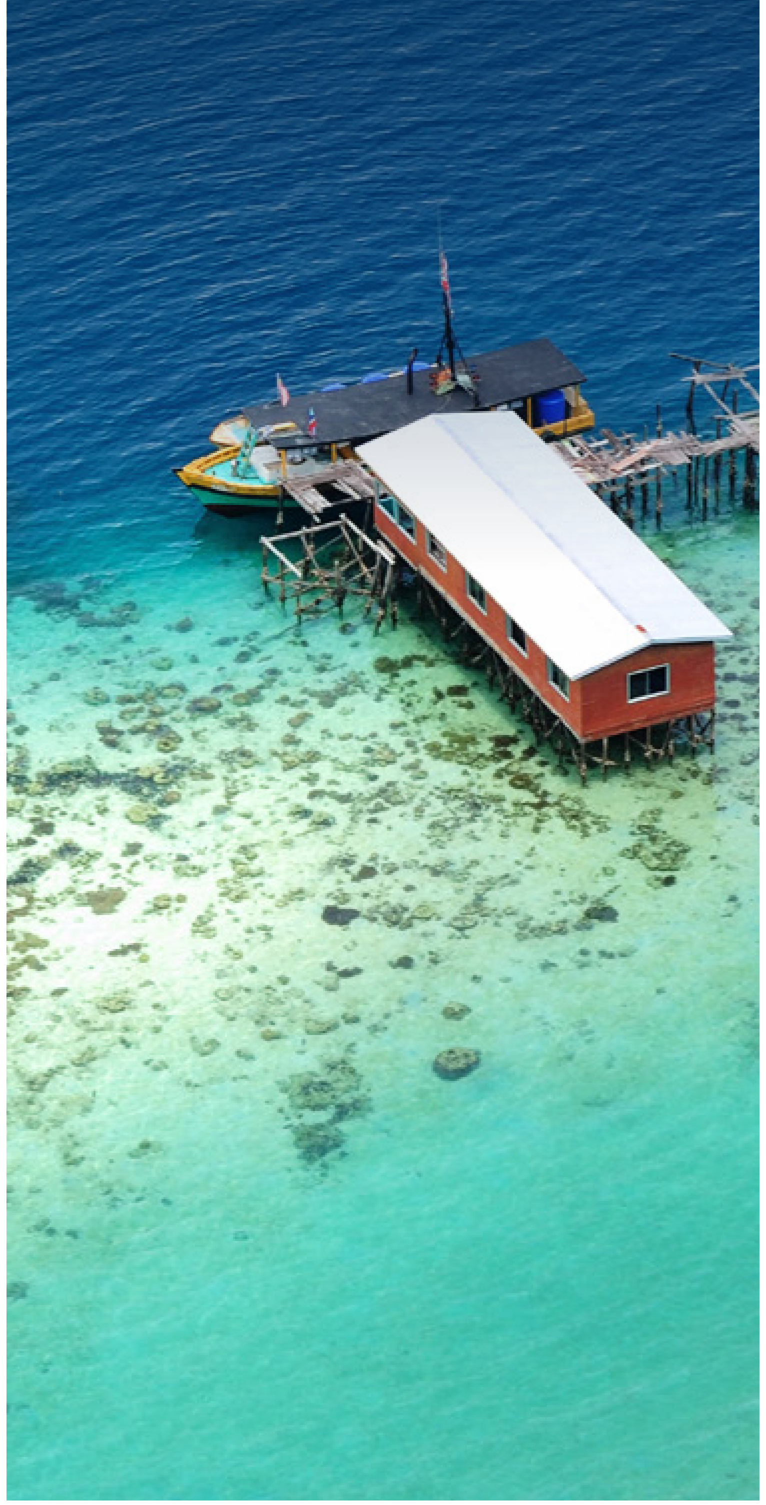
The increased tax credits for investments made between 1 January and 31 December 2023 are as follows:

	Base tax credit (%)			**Additional tax credit for increase in investment (%)**
	Large companies	Medium-sized companies	Small and medium-sized companies	
General	3 (increased from 1)	7 (increased from 5)	12 (increased from 10)	10 (increased from 3)
New growth and original technologies	6 (increased from 3)	10 (increased from 6)	18 (increased from 12)	10 (increased from 3)
National strategic technologies	15 (increased from 8)	15 (increased from 8)	25 (increased from 16)	10 (increased from 4)

The amendment also expanded the scope of qualified national strategic technologies. Companies whose investment amount in 2023 increased compared to its average investment amount for the immediately preceding 3 years can access the additional 10% tax credit with respect to the increase in investment amount, i.e. (investment amount in 2023 – average investment amount for the immediately preceding 3 years) x additional tax credit rate. Unutilized tax credits can be carried forward for up to 10 years.

JURISDICTION:

Malaysia



Malaysia Passes Finance Bill 2023

The Finance Bill 2023 (containing the government Budget including the proposed tax changes for 2023) was passed at both the House of Representatives (*Dewan Rakyat*) and the Senate (*Dewan Negara*) on 3 April 2023 and 10 April 2023 respectively. Reference is made to the Spring edition of this Bulletin for details. Included in the Bill is an amendment to extend personal income tax relief by up to RM 8,000 for deposits made by an individual into a National Education Savings Scheme (*Skim Simpanan Pendidikan Nasional, SSPN*) account for their child, until the year of assessment (YA) 2024 (previously until YA 2022).

Stamp duty exemption on restructuring or rescheduling of financing agreements

The Ministry of Finance has recently gazetted the Stamp Duty (Exemption) (No. 11) 2021 (Amendment) Order 2023 for the extension of the stamp duty exemption on any instrument of loan or financing agreement relating to the restructuring or rescheduling of loans or financing between a borrower or customer and a financial institution until 31 December 2024 (previously, until 31 December 2022).

Transfer pricing

The Ministry of Finance has recently gazetted the Income Tax (Transfer Pricing) Rules 2023 (TP Rules 2023), which revoke the Income Tax (Transfer Pricing) Rules 2012. The TP Rules 2023 are effective from the year of assessment 2023 onwards.

Contemporaneous transfer pricing documentation is brought into existence prior to the due date for furnishing a return in the basis period for a year of assessment in which a controlled transaction is entered into. Previously, the documentation is brought into existence when:

i. a person is developing or implementing any controlled transaction; and

ii. where the controlled transaction is reviewed and there are material changes, the documentation must be updated prior to the due date for furnishing a return for that basis period for that year of assessment.

The list of information required in the contemporaneous transfer pricing documentation is amended, and now includes:

- information of the Multinational Enterprise (MNE) Group as specified in Schedule 1 of the TP Rules 2023 that includes an overview of the businesses of a person that are relevant to the MNE Group's business in Malaysia in the basis period in which the controlled transaction is entered into;
- information regarding the person's business as specified in Schedule 2 of the TP Rules 2023 that must include transactions with its associated person in the basis period in which the controlled transactions are entered into;
- information and documents regarding a person's business participation in a cost contribution arrangement with its associated person in the basis period as specified in Schedule 3 of the TP Rules 2023;
- the date on which the contemporaneous transfer pricing documentation is completed; and
- any information, data or other related documents used by the person entering into the controlled transaction to determine an arm's length price, including the effect of material changes to the business conditions during the basis period.

In preparing a contemporaneous transfer pricing documentation, a person must determine an arm's length price based on the most current reliable information, data or documents that are reasonably available at the time of determination of that person's arm's length price.

In determining the arm's length price, the person must ensure the basis for the method selected be supported by an appropriate explanation and reasons as to why the method selected and the profit level indicator are better approximations to determine the arm's length price. The method selected may be subject to review and replaced by the Director General (DG) with the most appropriate method.

Previously, a hierarchy of methods was prescribed.

The DG may make an adjustment to reflect the arm's length price or interest rate by substituting or imputing the price or interest. Where the price at which a controlled transaction entered by a person is:

- within the arm's length range, such price may be regarded to be the arm's length price; or
- outside the arm's length range, the arm's length price shall be taken to be the median.

The DG may adjust the price of the controlled transaction to the median or any other point above the median within the arm's length range where the uncontrolled transaction is the kind which has a lesser degree of comparability, or where any of the comparability defects cannot be quantified, identified or adjusted.

The arm's length range is defined as a range of figures or a single figure falling between the values of the 37.5 percentile to the 62.5 percentile of the data set.

Advance Pricing Agreements

The APA Rules were gazetted on 29 May 2023. A taxpayer who carries out a cross-border transaction may apply for an advance pricing agreement (APA) as follows:

- if the counterparty is from a jurisdiction that has a double taxation agreement with Malaysia, the taxpayer may only apply for a bilateral APA or multilateral APA;
- if the counterparty is from a jurisdiction that does not have a tax treaty with Malaysia, the taxpayer may only apply for a unilateral APA; or

- for an arrangement made under a tax treaty, a permanent establishment may only apply for a bilateral APA or unilateral APA and such application must be made by its head office on its behalf.

A taxpayer who carries out a cross-border transaction may apply to the Director General for an APA in relation to a covered transaction. In this regard, the taxpayer's request for a pre-filing meeting must be furnished together with the following information:

- the contemporaneous transfer pricing documentation;
- names, addresses and tax file references of the taxpayer and other persons involved in the proposed APA, whether in Malaysia or outside Malaysia;
- the proposed covered transaction;
- the proposed period covered by the APA;
- the proposed transfer pricing methodology accompanied with an explanation of whether the method accords to the arm's length principle;
- a description of the critical assumptions under which the proposed transfer pricing methodology and analysis relating to the critical assumption will operate and the events that should be taken into account when considering the said assumption;
- financial statements and tax computations that are available at least for the last 3 years prior to the application;
- a written indication whether the income in relation to the covered transactions is exempt from tax by the other Competent Authority;
- the name, telephone number and e-mail of the contact person of the company; and
- any other details as determined by the Director General.

Miscellaneous points to note:

- A taxpayer may submit to the Director General the APA application within 6 months (previously, 2 months) after receipt of notification from the Director General.
- The application for an APA may be declined under several circumstances, including where the proposed covered transaction involves improper use or abuse of tax treaties to obtain unintended benefits.
- Additional information will be required to be submitted with the annual compliance report.
- If the request for further information and documents by the Director General at any stage of the APA process is not fulfilled within 30 days, the application will be deemed as withdrawn by the taxpayer.
- A rollback is allowed for no more than 3 years of assessment immediately preceding the covered period.
- The details of fees and other payments applicable in respect of APA applications are provided.

Energy and petroleum lease of assets

The Inland Revenue Board (IRB) has issued guidelines for the tax treatment of lease expenses for special assets under the Petroleum (Income Tax) Act 1967 (PITA). The guidelines provide clarity on the tax treatment of lease expenses for special assets such as a floating production system (FPS), floating production storage & offloading (FPSO) and floating storage & offloading (FSO) under subsection 15(1) of the PITA.

Lease expenses incurred by a lessee are deductible, provided that the expenditure is wholly and exclusively incurred during the basis period in the production of gross income. Meanwhile, a claim for capital allowance is allowed if the expenditure incurred is a qualifying capital expenditure.

The lease referred to under these guidelines is the type of lease that allows for the use of an asset, where the ownership rights of the asset remain with the lessor at the end of the lease period.

The parties involved in a lease agreement for special assets such as FPS, FPSO and FSO are:

- the lease provider (i.e. the lessor); and
- the chargeable person, who uses such special assets to carry out petroleum operations (i.e. the lessee).

Even though the following terms in a lease agreement may indicate the existence of a deemed sale arrangement under accounting standards:

- asset ownership;
- ease period;
- option to purchase; and
- cost related to insurance, equipment inspection and testing, maintenance and operating licenses or permits,

the tax treatment of lease transactions on special assets under the PITA is different because the ownership of special assets at the end of the lease period (in substance) is still with the lessor. The lease expense for the special asset will qualify for deduction under subsection 15(1) of the PITA.

E-Invoicing System from January 2024

The Malaysian tax authority has announced the implementation of the e-invoicing system will be launched in stages starting from January 2024. It is expected to not only improve the quality of services offered by the tax administrators, but also benefit taxpayers by improving business operations efficiency, facilitating business record keeping and reducing their tax compliance costs. E-invoicing can also create more transparent businesses transactions thus helping the government to overcome shadow economy problems in business transactions.

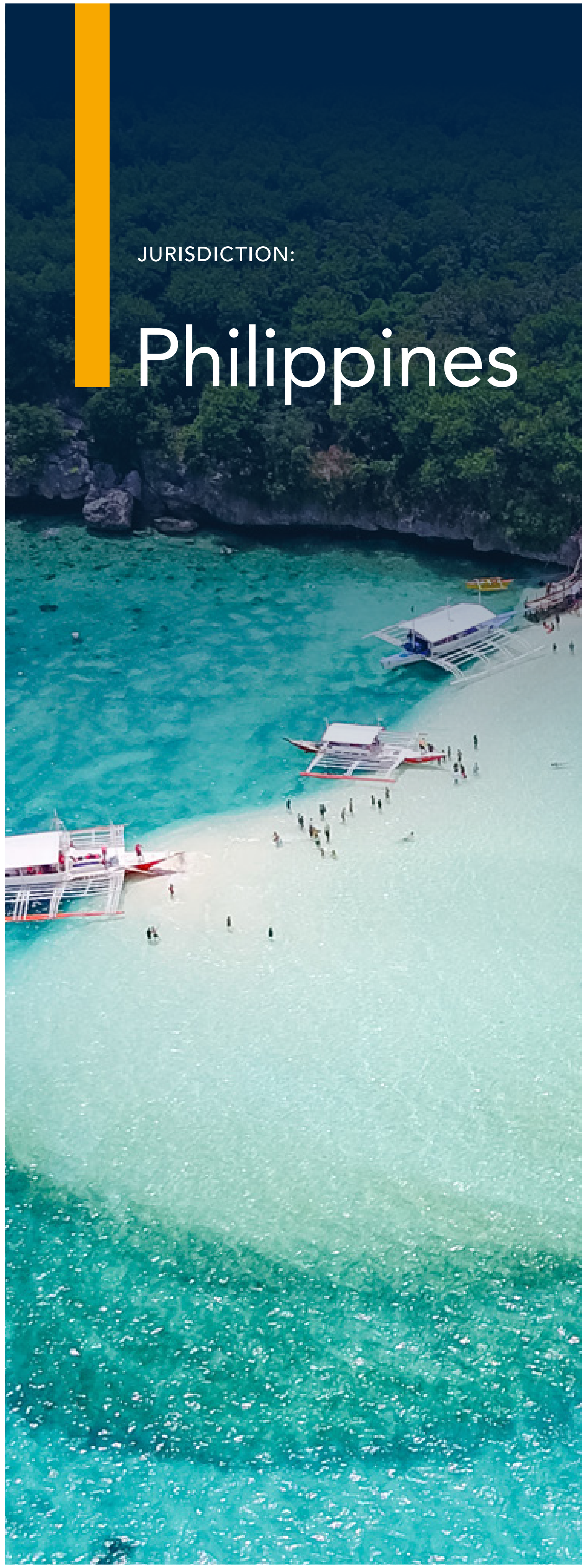
The pilot project for the implementation of e-invoicing will be launched for selected companies in January 2024. From June 2024, implementation of the e-invoicing system will be made mandatory for companies with annual turnovers of more than MYR 100 million. This will be followed by companies with annual turnovers of more than MYR 50 million in January 2025 and thereafter, companies with annual turnovers of more than MYR 25 million from January 2026. The use of e-invoicing will be mandatory for all businesses from January 2027 onwards.

Voluntary disclosure programme for Indirect Taxes

The Royal Malaysian Customs Department (RMCD) announced that the Voluntary Disclosure Programme (VDP) for indirect taxes, which was announced during the Government's Budget for 2023, will be implemented from 1 June 2023 until 31 May 2024. Taxpayers with unpaid tax liabilities due to the RMCD on or before 28 February 2023 will be given a 100% remission of penalties under the VDP. The VDP is applicable to sales tax, services tax, goods and services tax and tourism tax.

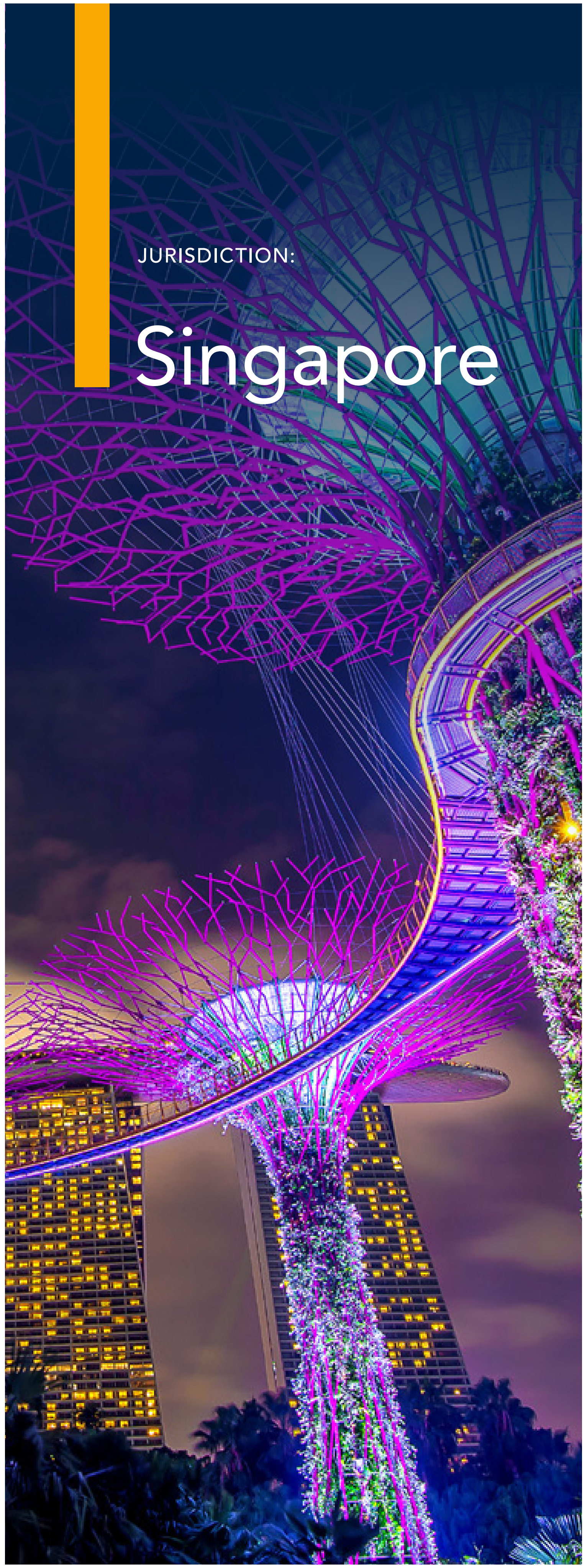
Stamp duty

The Prime Minister announced the reduction of the stamp duty rate for shares traded on the Malaysian stock exchange (Bursa Malaysia) from the current rate of 0.15% to 0.10% of the contract value, subject to a maximum cap of MYR 1,000 per contract, with effect from July 2023. This is part of the government's effort to widen the affordable investment choices for the public and deepen investors' interest in the domestic capital market to boost the Malaysian capital market.



Regional trade agreement

On 2 June 2023, the Regional Comprehensive Economic Partnership Agreement (RCEP) between the Association of Southeast Asian Nations (ASEAN) and ASEAN's free trade agreement partners (Australia, China, Japan, Korea and New Zealand), signed on 15 November 2020, entered into force in respect of the Philippines. The entry into force follows the Philippines depositing its instrument of ratification with the depositary, the Secretary-General of ASEAN, on 3 April 2023.



Income tax reform

On 6 June 2023, the Ministry of Finance issued proposals for 33 legislative amendments to the Income Tax Act 1947 ("ITA") to effect: (i) tax measures announced in the 2023 Budget Statement on 14 February 2023 (19 amendments); and (ii) changes arising from international tax developments and MOF's periodic review of Singapore's tax system to better reflect policy objectives and to improve tax administration (14 amendments). Key amendments include the following:

Enterprise Innovation Scheme ("EIS")

To encourage businesses to engage in research and development ("R&D"), innovation and capability development activities, MOF will introduce the EIS. Under the EIS, MOF will increase existing tax deductions/ allowances for R&D, Intellectual Property ("IP") registration, IP rights acquisition and licensing, and qualifying training to 400% for the first $400,000 of qualifying expenses incurred for each qualifying activity per Year of Assessment ("YA"). MOF will also introduce a new 400% tax deduction for up to $50,000 of qualifying innovation expenditure incurred on qualifying innovation projects carried out with selected partner institutions per YA. Eligible businesses can, in lieu of tax deductions/ allowances, opt for a non-taxable cash grant at a cash conversion ratio of 20% on up to $100,000 of total qualifying expenditure across all qualifying activities. These new or enhanced tax measures will be effective from YA 2024 to YA 2028.

Philanthropy Tax Incentive Scheme for Family Offices ("FOs")

To strengthen Singapore's position as a regional philanthropy hub and encourage FOs to anchor their giving operations in Singapore, MOF will introduce a pilot tax incentive scheme for qualifying donors with FOs operating in Singapore. The pilot will be in effect for five years starting from YA 2025, and will be reviewed in 2028. To qualify, the donors must have a fund under MAS' section 13O or 13U scheme and meet eligibility conditions, such as incremental business spending of

$200,000. Under the scheme, qualifying donors will be able to claim 100% tax deduction for overseas donations made through qualifying local intermediaries. The tax deduction will be capped at 40% of the donor's statutory income.

Change Working Mother's Child Relief ("WMCR") from a percentage of earned income to a fixed dollar tax relief for qualifying children born or adopted on or after 1 January 2024

As part of the review of our support measures for Marriage & Parenthood, the WMCR will be changed to a fixed dollar tax relief for qualifying children born or adopted on or after 1 January 2024. Eligible working mothers can claim $8,000, $10,000, and $12,000 for their first, second and subsequent children respectively. There is no change to the WMCR (based on a percentage of earned income) that a mother can claim in respect of qualifying

Tax gains from the sale of foreign assets that are received in Singapore by businesses without economic substance in Singapore

The proposed tax change is to align the treatment of gains from the sale of foreign assets to the EU Code of Conduct Group guidance, which aims to address international tax avoidance risks. The proposed tax will apply to gains from the sale of foreign assets that are received in Singapore by entities of multinational ("MNE") groups that do not have economic substance in Singapore. The proposed change will apply to gains from the sale of foreign assets received in Singapore on and after 1 January 2024.

A new section 10L (gains of a relevant entity from the sale of foreign assets) is proposed to be introduced in the Income Tax Act, to treat gains received in Singapore by a relevant entity from the sale of immovable or movable property situated outside Singapore (referred to in the section as foreign assets) as income chargeable with tax. This section applies if the gains would not otherwise be treated as income or if the gains would otherwise be exempt from tax under the Act. This section only applies to entities that are part of a multinational group and that do not have reasonable economic substance in Singapore, based on (among other things) the number, qualifications and experience of its employees, the amount of business expenditure incurred in Singapore by the entity and whether its key business decisions are made in Singapore. A group of entities that only have business operations in Singapore is not subject to this section. This section also does not apply to any sale or disposal of foreign assets by financial institutions or entities under certain tax incentive schemes, or to gains received in Singapore by individuals. Only the net amount of gains (after deducting relevant expenditure) that are received in Singapore or deemed to be received in Singapore is taxable. Where the sale of the foreign asset is at a price less than the open market price of the foreign asset, the Comptroller may treat as the amount of gain received in Singapore, the open market price of the foreign asset.

Mandate submission of income information by intermediaries for Self-Employed Persons ("SEPs")

This is to facilitate the income tax assessment of SEPs (e.g. commission agents) by transmitting the income directly from the intermediaries to IRAS. This will also facilitate the administration of schemes that cover SEPs such as the Workfare Income Supplement, and allow the government to roll out SEP schemes more quickly and effectively going forward. A phased implementation approach will be adopted based on the readiness of the various industries.

Interest rate peg amendment

The Prime Lending Rate ("PLR") is currently legislated as the interest rate to be charged on refund of income taxes under section 93 of the ITA. Section 93 provides that where the Comptroller appeals against an order or decision by the Income Tax Board of Review or court, and withholds a refund of tax arising from such decision, the Comptroller shall pay interest (with effect from the date of the order or decision appealed against) on the amount of refund ultimately determined to be due, as a result of the appeal. MOF proposed a transition from the PLR to the 3-month compounded SORA with a 1.5%-pt spread, because the PLR's relevance in the market has diminished and it is not currently used by most banks to set interest rates for their products. The proposed amendment to section 93 will seek to update the PLR references for interest on refund of taxes to the SORA.

Withholding tax on chargeable income instead of gross payment for non-resident professionals/ foreign firms ("NRP/FF") and non-resident public entertainers ("NRPE")

The proposed amendments will align the law with IRAS' current administrative concession for withholding tax to be computed based on chargeable income instead of gross payments for payments made to: a. NRP/FF that have opted to be taxed at the statutory rate of 24% under section 43(5) of the ITA; and b. NRPE at the statutory rate of 15%. The proposed amendments will take effect from the date the Amendment Act is published in the Gazette.

Non-monetary consideration under GST Act

The General Division of the Singapore High Court has recently published its decision in *Herbalife International Singapore Pte Ltd v. the Comptroller of Goods and Services Tax* [2023] SGHC 54, in which it reversed the decision of the Goods and Services Tax Board of Review (GSTBR) in GEV v. the Comptroller of Goods and Services Tax [2022] SGGST 1 and ruled that the supply of certain nutritional supplements, weight-management products and other personal care products pursuant to a direct selling business model should, for Singapore goods and services tax (GST) purposes, be valued at its consideration under section 17(2) of the Goods and Services Tax Act 1993 of Singapore (GST Act) – and not its open market value (OMV) under section 17(3) of the GST Act.

Herbalife International Singapore Pte Ltd (Herbalife), a GST-registered direct selling company, sells products to its members at four different tiers of discount (25%, 35%, 42% and 50%) off the base value of the products, depending on the sale volume of these members and those of new members referred to Herbalife by such members. The members will in turn sell the products to consumers.

The Comptroller of GST was of the view that the value of the consideration for supply of the products to the members comprised both monetary consideration (the discounted price) and non-monetary consideration (services provided by members to Herbalife), and therefore the value of the supply should be the OMV of the products, and not merely the monetary consideration. The Comptroller accepted that the OMV of the products was the retail price of the products with a 25% discount.

The GSTBR ruled in favour of the Comptroller and set out two "touchstones" in determining whether the undertaking of obligations can constitute non-monetary consideration within the scope of section 17(3) of the GST Act. First, the undertaking or obligation must be independent of and not ancillary to the supply of goods. Second, the undertaking or obligation must provide a benefit which goes beyond the monetary transaction, to constitute non-monetary consideration. The GSTBR found that both conditions were satisfied in this case.

The issue before the High Court was whether the value of supply of the products on which GST is levied should be the discounted price paid by the members (under section 17(2) of the GST Act) or the OMV of the products (under section 17(3) of the GST Act).

The High Court reversed the decision of the GSTBR. The High Court found the existence of a special valuation provision in the United Kingdom's value added tax legislation (VAT Act), which is ostensibly absent in the GST Act, to be a "strong indicator" that direct selling cases normally do not involve supplies made for non-monetary consideration under Singapore law. While the High Court broadly endorsed the two "touchstones" proposed by the GSTBR in ascertaining whether an undertaking or obligation constitutes non-monetary consideration, it disagreed with the GSTBR's decision on the following grounds.

1. Regular terms of trade would not ordinarily be independent of (and not ancillary to) a supply of goods unless the provision of something non-monetary in exchange for such supply is contractually demanded. Here, the terms imposed by Herbalife on its members do not require such members to provide marketing services to Herbalife; instead, the terms were imposed for members to qualify to receive the supply, regulate the use of the products once obtained or regulate their conduct as members - without more, these terms do not constitute non-monetary consideration.

2. For "benefits" to a supplier to be non-monetary consideration, it must be provided by the recipient in exchange for the supply. Benefits arising from regular terms of trade do not ordinarily constitute non-monetary consideration. For something to be considered non-monetary consideration provided by the recipient of the supply of goods for the purposes of section 17(3) of the GST Act, it must be sufficiently valuable and clear that it was provided by the recipient in exchange for the supply of goods. One indicator of such a "benefit" provided by the recipient would be a parity of value between the non-monetary "benefit" and the goods supplied – i.e., the non-monetary "benefit" should bridge the discrepancy between monies paid and the regular price of the product in question. In this case, what was received by Herbalife was the compliance of its members with the contractual terms of trade. Such obligations were merely "by-products" or "results" of the membership agreement and it was not sufficiently valuable and clear that such obligations were undertaken in exchange for the supply of goods.

As there was no discernible non-monetary consideration provided for the supply of the products, section 17(3) of the GST Act would not be applicable. GST should be chargeable based on the value of monetary consideration under section 17(2) of the GST Act.

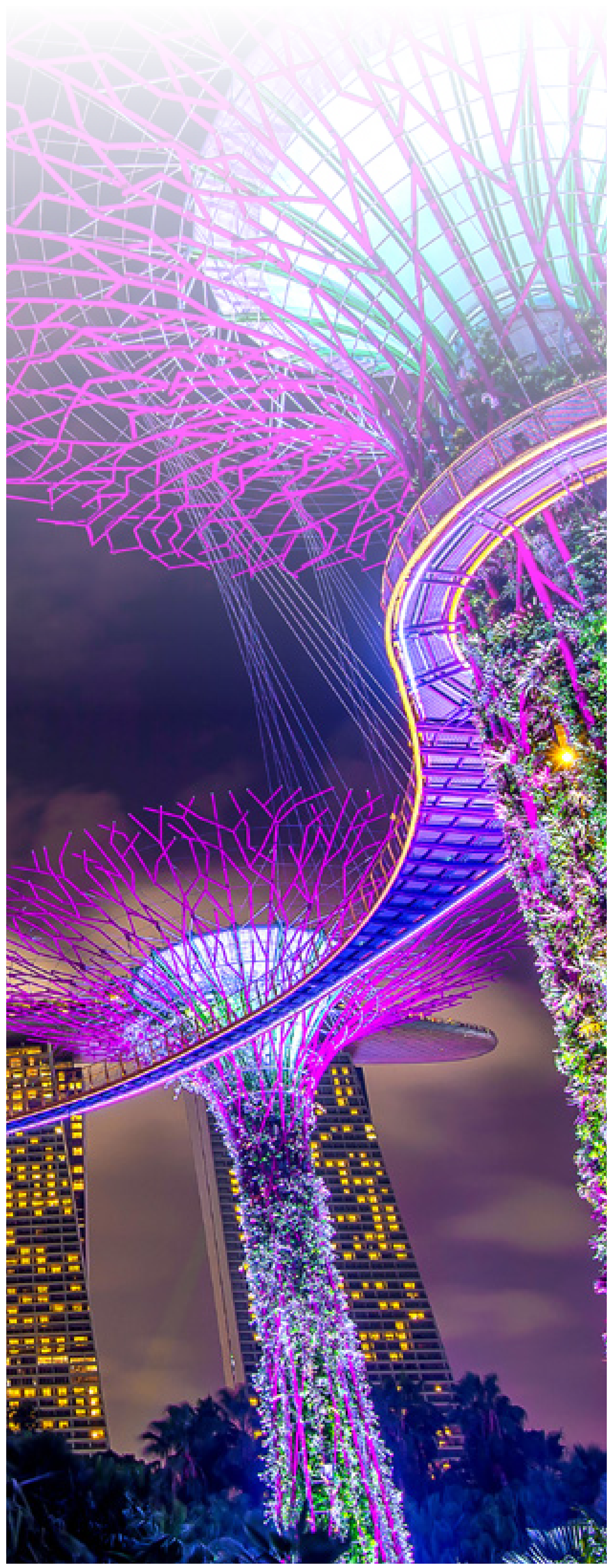
(d) Reaction. The High Court's decision affirms a narrow interpretation of what constitutes "consideration not consisting or not wholly consisting of money". It would be interesting to see if the GST Act will be amended to provide for special valuation rules for direct selling model businesses.

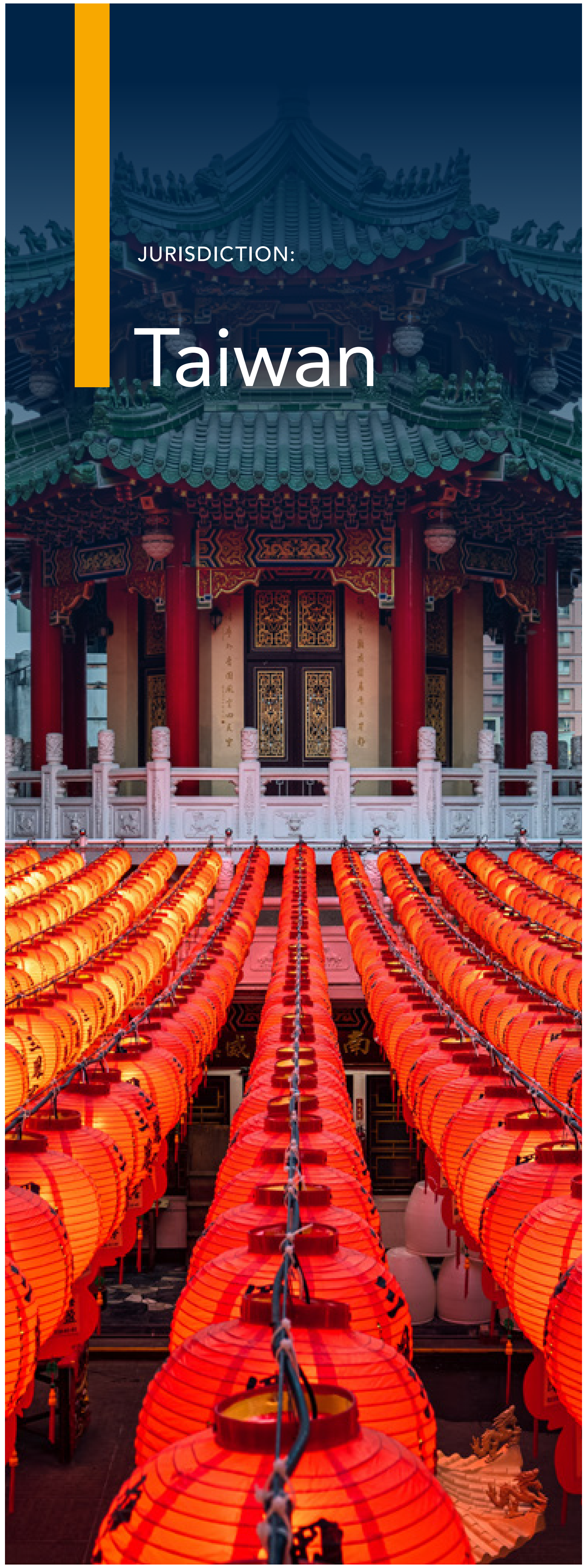
General Anti Avoidance Rule

The Inland Revenue Authority of Singapore (IRAS) has updated the e-Tax guide on the general anti-avoidance provision by including the following two categories of tax avoidance arrangements.

- setting up of a conduit entity to obtain a treaty benefit for the purpose of avoiding withholding tax; and
- assignment of debt to an offshore jurisdiction for the main purpose of obtaining a tax advantage.

The updated e-Tax guide also includes information on the surcharge to be imposed on the tax or additional tax arising from an adjustment made by the Comptroller of Income Tax if an arrangement is considered to be an avoidance arrangement.





R&D and equipment investment tax credits

Following the amendment to article 10-2 of the Statute for Industries Innovation on 7 January 2023 to provide tax incentives in the form of tax credits for investment in research and development (R&D) and equipment, the Ministry of Economic Affairs has announced the investment thresholds and qualifying conditions which are summarized as follows:

- to qualify for the tax credit of 25% of R&D expenditure, the R&D investment threshold is TWD 6 billion and the ratio of R&D intensity is 6% (i.e. the ratio of R&D expenses to operating revenue); and
- to qualify for the tax credit of 5% of investments in advanced manufacturing equipment, the investment threshold is TWD 10 billion.

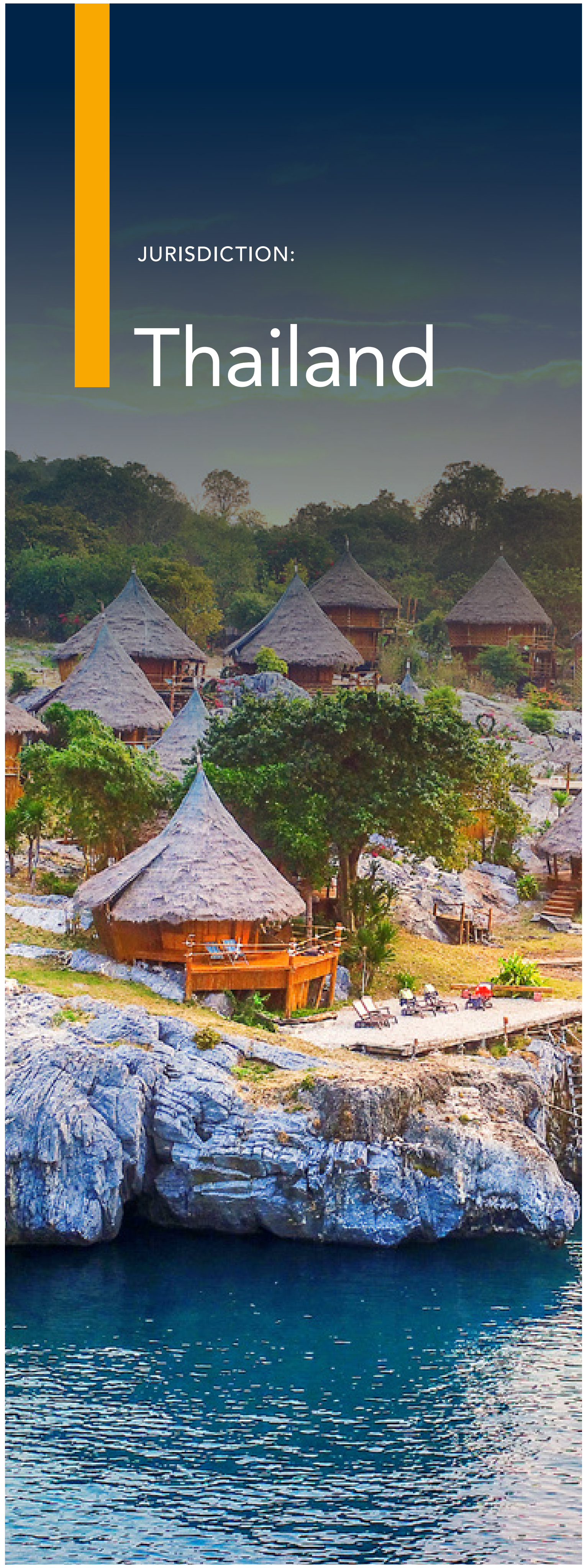
The total tax credit amount for both incentives is limited to 50% of income tax payable in a fiscal year. The incentives are available from 1 January 2023 to 31 December 2029.

Warrants Trading

The Executive Yuan has announced an amendment to the Statute for Securities Transaction Tax, to reduce the tax rate on the trading of warrants from 0.3% to 0.1% for risk hedging purposes. This tax reduction is aimed at lowering the costs of fulfilling warrant quotation obligations and attracting more investors to participate in the warrants market. The tax reduction is applicable for 5 years and will take effect 6 months after the amendment is passed by the Legislative Yuan.

International tax developments

USA. On 1 June 2023, Taiwan and the United States signed the first agreement under the 21st-Century Trade Initiative, in Washington. The agreement covers customs administration and trade facilitation, good regulatory practices, services domestic regulation, anti-corruption and small- and medium-sized enterprises. Additional negotiations on other trade areas of the negotiating mandate are expected in the near future.



Automatic exchange of financial information (CRS)

On 30 March 2023, Thailand's Official Gazette published a royal decree ratifying the Multilateral Competent Authority Agreement on Automatic Exchange of Information Agreement on the introduction of the automatic exchange of information in tax matters on a reciprocal basis. The CRS MCAA is a multilateral competent authority agreement, based on article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which deals with the automatic exchange of financial account information pursuant to the OECD/G20 Common Reporting Standard (CRS).

JURISDICTION:

Vietnam

VAT rate reduction

On 24 June 2023, the National Assembly passed a resolution to reduce the standard VAT rate of 10% from 1 July to 31 December 2023 by 2%, with certain exceptions (telecommunications services, information technology, banking, financial and securities services, real estate business goods and services, metal goods and services, prefabricated metals, mining products (not inluding coal mining), coke, refined petroleum, chemical products and commodity products). This is based on article 3 of Resolution 43/2022/QH15 dated 11 January 2022.

Multilateral Convention (MLI)

On 23 May 2023, Vietnam became the 81st jurisdiction to deposit its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The convention will enter into force in respect of Vietnam on 1 September 2023. The final version of Vietnam's MLI position can be found here.

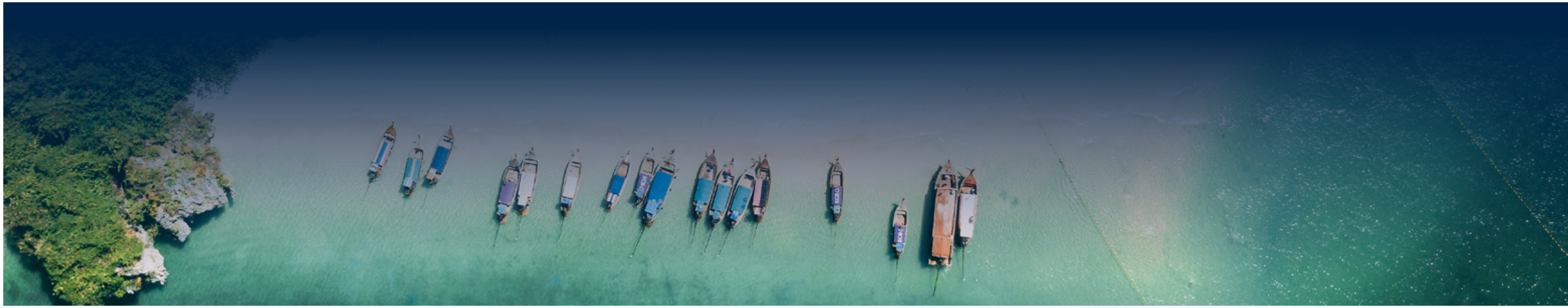
Vietnam submitted its provisional MLI position at the time of signature, listing its reservations and notifications and including 75 tax treaties that it wishes to be covered by the MLI. For details of Vietnam's Reservations and Notifications.

Tax payment deadlines for 2023 extended

The government has extended the tax payment deadlines for corporate income tax, personal income tax and value added tax (VAT) in 2023. The extension applies to qualifying enterprises, organizations, business households and individuals in economic sectors specified in Decree 12/2023/ND-CP of 14 April 2023

- corporate income tax for the first and second quarters of 2023: 3 months from the statutory deadline;
- personal income tax and VAT for business households and individuals for 2023: by 30 December 2023; and
- VAT for enterprises and organizations: 6 months for the tax period March to May 2023 and the first quarter of 2023, 5 months for June 2023 and the second quarter of 2023, 4 months for July 2023 and 3 months for August 2023.

The payment deadline for 50% of land rent payable in 2023 has also been extended by 6 months (i.e., the extended deadline is 30 November 2023). Eligible taxpayers must submit a one-time application for an extension for the entire tax and rent due at the time of filing of the monthly or quarterly returns, or by 30 September 2023 to the relevant tax office.



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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.