MAYER | BROWN

Asia Tax Bulletin

Winter 2023/24

In This Edition

We are pleased to present the Winter 2023/24 edition of our firm's *Asia Tax Bulletin*.

Dear Reader,

In response to the European Union's Code of Conduct Group, Hong Kong, Singapore and Malaysia have amended their local income tax laws to introduce a capital gains tax on the sale of assets.

In the case of Hong Kong and Singapore, the capital gains tax applies to the sale of offshore capital assets, while the capital versus income distinction continues to apply to the sale of onshore capital assets.

Hong Kong already introduced the capital gains tax on gains from the sale of offshore equities in 2023 but had to expand the scope of the capital gains tax to offshore non-equities to comply with the European Union requirements.

The sale of offshore IP rights is also within the scope of the new capital gains tax, but a distinction is made between patents and other IP rights.

Malaysia has introduced a capital gains tax on gains derived from the sale of both onshore and offshore capital assets, albeit at different tax rates, and a temporary exemption of the new tax is provided until 1 March 2024 in order to enable taxpayers to consider the new rules.

Interestingly, transactions in Malaysian real property by corporations are now subject to the new capital gains tax rule rather than being taxed under the Real Property Gains Tax Act. These and other changes are highlighted in this edition of the Asia Tax Bulletin which we hope you will find helpful.

We wish all our readers a Happy New Year and all our Chinese readers a Happy New Year of the Dragon!

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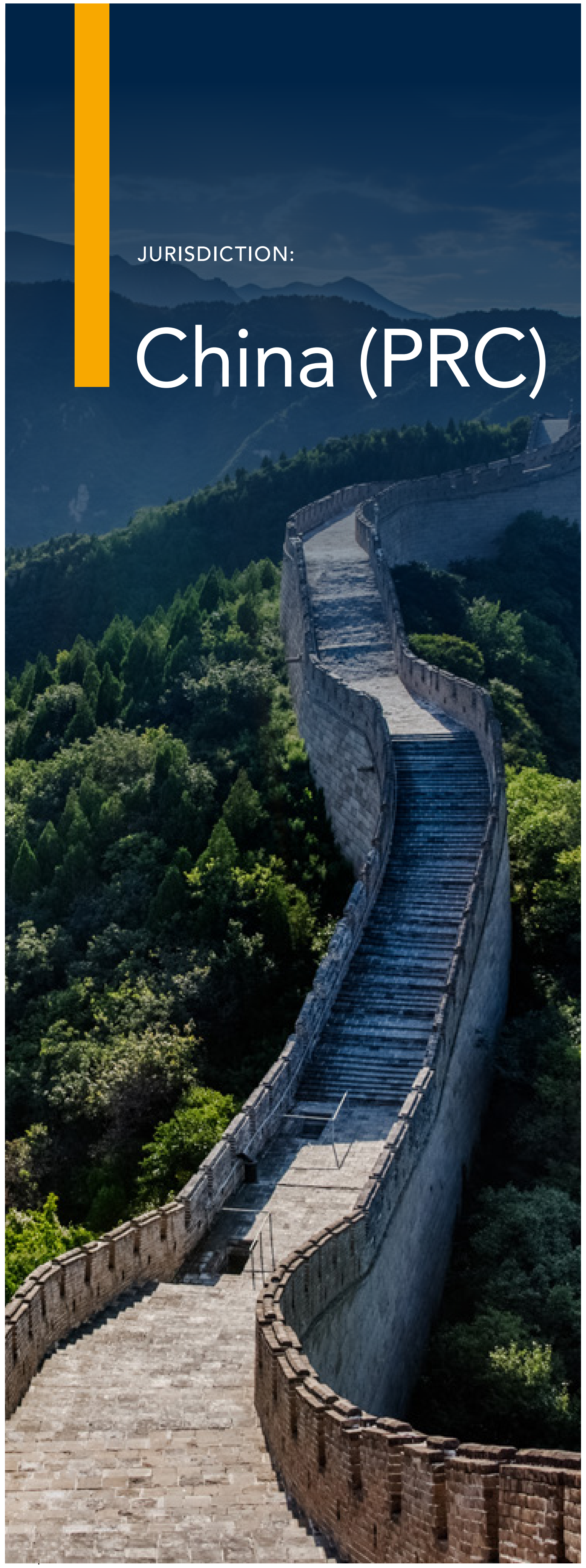


Preferential policies

To stabilize market expectations, boost market confidence, and stimulate market vitality, the State Taxation Administration (STA) issued a document entitled Summary of Extended Tax and Fee Preferential Policies (2023 version) (hereinafter referred to as the "2023 Summary") for taxpayers' references. The 2023 Summary encompasses 70 extended, improved, and optimized tax and fee preferential policies that have been formulated and publicly released by the STA, in collaboration with the Ministry of Finance (MOF) and other government authorities, from 2023 until the end of October 2023. Additionally, it includes six official interpretations on tax policies, frequently asked questions and answers. The preferential policies involve a super input Value-added Tax credit policy for advanced manufacturing enterprises (until the end of 2027) and policies without a sunset clause (e.g., MOF/STA PN [2023] No. 7 (PN 7, i.e., further optimizing the policy on super deduction of research and development expenditures).

International tax developments

On 17 October 2023, China signed double tax treaties with Cameroon and Senegal, respectively.

Foreign sourced gains and investment income

Hong Kong's Legislative Council on 29 November 2023 passed the proposed refinements to Hong Kong's foreign-sourced income exemption (FSIE) regime by expanding the scope of assets in relation to foreign-sourced disposal gains to cover assets other than shares or equity interests. The changes have taken effect on 1 January 2024.

According to a press release on the Bill, Hong Kong's tax regime will be thus brought into line with the latest requirement of the Guidance on Foreign Source Income Exemption Regimes updated by the European Union in December 2022 that disposal gains, as a general class of income covered by the FSIE regime, should be subject to the economic substance requirement. Hong Kong committed to amending its tax regime by the end of 2023 and implementing the refined regime with effect from January 2024. Hong Kong will request the European Union to remove it from its watchlist given the completion of the legislative amendments.

Consequently, taxable disposal gains are expanded to cover gains or profits derived from the sale of any offshore property.

Depending on the nature of the property disposed, disposal gains are classified into the following categories:

- intellectual property (IP) disposal gains: gains or profits derived from the sale of IP;
- non-IP disposal gains: gains or profits derived from the sale of property, excluding IP disposal gains. In other words, non-IP disposal gains include disposal gains from the sale of equity interests in an entity (equity interest disposal gains).

Under the refined FSIE regime, various exemptions and reliefs that currently apply to the previously broad category of disposal gains will be narrowed to non-IP disposal gains. Excluded from covered income is any non-IP disposal gain that accrues to an entity that is a trader and is derived from or is incidental to its business as a trader (trader means any entity that sells, or offers to sell, property in the entity's ordinary course of business).

Foreign-sourced non-IP disposal gains will be exempt from tax if the MNE entity has adequate economic substance in Hong Kong. The alternative participation requirement will apply to equity interest disposal gains. For foreign-sourced IP disposal gains, the extent of the tax exemption will be determined by the nexus approach promulgated by the OECD.

An intra-group transfer relief is provided for disposal gains if the following conditions are met:

- the selling entity received in Hong Kong any specified foreign-sourced income which is a disposal gain;
- the sale from which the gain is derived (subject sale) is an intra-group transfer;
- the property to which the subject sale relates is acquired by an entity (acquiring entity); and
- both the selling entity and the acquiring entity are, at the time of the subject sale, subject to profits tax.

Any tax imposed on disposal gains will be deferred if the asset concerned is transferred between associated entities, subject to specific anti-abuse rules.

On 16 October 2023, the IRD updated its website on its guidance with respect to Hong Kong's tax rules applicable to its Refined Foreign Sourced Income Exemption regime. The information has been updated specifically in respect of gains derived from the sale of offshore assets. Previously the rules only applied to offshore shares.

The expanded scope of the taxation of (non-trading) gains on the sale of offshore assets applies with effect from 1 January 2024 if the Hong Kong seller receives the sales proceeds in Hong Kong and does not have sufficient economic substance in Hong Kong. A similar rule has been adopted by Singapore (please refer to the Singapore section of this bulletin), which also took effect on 1 January 2024.

Re-domiciliation of foreign companies to Hong Kong

Similar to the re-domiciliation facility for funds introduced in 2021, it was announced that Hong Kong will be introducing its inward re-domiciliation regime, which will allow companies incorporated outside of Hong Kong to change their place of incorporation to Hong Kong. Unlike the similar regime in Singapore, no economic substance test will be expected in the legislative updates in early 2024. Legislative changes will also be made to provide appropriate safeguards to allow re-domiciliation to be carried out in a tax-neutral manner, thereby providing a greater degree of certainty to re-domiciled companies on their tax liabilities in Hong Kong.

It is expected that legislative amendments for inward re-domiciliation will be released in early 2024, i.e., a regime for foreign companies to re-domicile to Hong Kong but not vice versa. The difference with Singapore's regime is that there will be no economic substance test in the Hong Kong regime.

The proposed regime streamlines the re-domiciliation process for businesses with an APAC focus without court intervention, winding-up or re-incorporation processes.

The proposed regime will cover five categories of companies that could be formed in Hong Kong under the Companies Ordinance or their comparable types in the company's original place of incorporation. The redomiciled company will retain maximum business continuity — as the same legal identity, having the same rights, obligations, liabilities, other property rights (e.g., IP rights, existing contractual relationships) and corporate history.

The Registrar of Companies will administer the proposed regime and approve company re-domiciliation applications based on factors such as company type, fulfilment of compliance requirements in the original place of incorporation, integrity, member and creditor protection, solvency, etc.

Following successful re-domiciliation and de-registration from its original place of incorporation, the re-domiciled company should observe statutory requirements of its kind as incorporated in Hong Kong and, if required, obtain licenses to conduct relevant business in Hong Kong.

The re-domiciliation should not affect the Hong Kong profits tax liabilities of a redomiciled company. A company (regardless of its domicile) that carries on a business, trade or profession in Hong Kong is liable to pay Hong Kong profits tax

on profits arising in or derived from Hong Kong from such business, trade or profession. The re-domiciliation process should not result in any change in the beneficial ownership of the assets of the re-domiciled company. For this reason, the re-domiciliation process should also not trigger any stamp duty implications. Legislative changes are expected to clarify these issues, as well as to address transitional tax issues relating to matters that have occurred before the re-domiciliation but that can affect the position post re-domiciliation, including deductions for trading stock, bad debts, impairment losses on financial assets, and depreciation.

Capital gains on sale of onshore equity interests

The Legislative Council passed the tax certainty enhancement scheme as proposed in the Inland Revenue (Amendment) (Disposal Gain by Holder of Qualifying Equity Interests) Bill 2023, which provides greater certainty of non-taxation of onshore gains on disposals of equity interests that are of a capital nature.

Under the tax certainty enhancement scheme, the gains made by an investor entity will be treated as capital in nature and not chargeable to profits tax if the investor entity has held certain equity interests in the investee entity throughout a continuous period of 24 months immediately before the date of disposal, and those equity interests amount to at least 15% of the total equity interests in the investee entity, subject to certain conditions imposed to uphold the integrity of Hong Kong's tax system. This obviates the need for assessing the taxability of such gains based on the "badges of trade" approach.

This law change applies to disposals on or after 1 January 2024 and gains accrued in the basis period for a year of assessment beginning on or after 1 April 2023.

Aircraft leasing

The Government published in the Gazette on November 17, 2023 the Inland Revenue (Amendment) (Aircraft Leasing Tax Concessions) Bill 2023 to enhance the aircraft leasing preferential tax regime (Regime) introduced in 2017, with a view to strengthening Hong Kong's competitiveness in the global aircraft leasing industry.

The Bill amends the Inland Revenue Ordinance (Cap. 112) with proposed legislative amendments covering the following aspects:

1. to provide qualifying aircraft lessors with tax deduction of the acquisition cost of aircraft;
2. to expand the scope of the Regime to include wet lease and funding lease and remove the one-year term of lease restriction;
3. to provide for a more general meaning of "aircraft leasing activity" so that the Regime will cover leasing activities other than leasing aircraft to aircraft operators;
4. to allow deduction of interest payable for acquisition of aircraft to a financier outside Hong Kong who is not a financial institution and may be an associate of the borrower; and
5. to prescribe threshold requirements for aircraft lessors and aircraft leasing managers qualifying for the Regime to comply with the requirements of Organisation for Economic Co-operation and Development (OECD).

According to a Hong Kong government spokesman, aircraft leasing is global and footloose in its operations, and tax incentive is a key, if not the most important, consideration for aircraft lessors to choose where to conduct their businesses. With the proposed enhancement measures, the government strives to capitalise on Hong Kong's strengths in finance and professional services to boost the competitiveness of Hong Kong for this highly mobile and globalised industry, thereby diversifying the economic structure of Hong Kong and promoting Hong Kong's soft power as an international aviation and financial hub.

The Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area advocates leveraging Hong Kong's strengths in financial and logistics services to develop high-value added cargo, aircraft leasing and aviation financing services. The report to the 20th National Congress of the Communist Party of China supports Hong Kong to give full play to its strengths and distinctive features and to consolidate and elevate its international position in such fields as finance, trade, shipping and aviation. There have been noticeable market changes in the global aircraft leasing industry in recent years due to reasons including the pandemic. The upcoming implementation of international tax reform proposals drawn up by the OECD (commonly known as BEPS 2.0) will also diminish the competitiveness of the Regime. The Regime needs to keep pace with market changes and international tax reforms to retain the existing aircraft leasing businesses and the associated tax revenue and economic benefits as well as capturing a larger global market share, the spokesman added.

Upon the passage of the Bill, the legislative amendments will take retrospective effect from the year of assessment beginning on April 1, 2023, to allow the early implementation of the enhancement measures. The The Bill was introduced into the Legislative Council for first and second readings on November 29, 2023.

Global minimum tax for large MNCs (Pillar 2)

On 21 December 2023, the Hong Kong government launched a consultation exercise to gather views on the implementation details of the global minimum tax under Pillar Two of the international tax reform proposals drawn up by the Organisation for Economic Co-operation and Development (OECD) to address base erosion and profit shifting risks arising from the digitalisation of the economy (commonly known as BEPS 2.0).

The BEPS 2.0 package was promulgated by the OECD in October 2021. The goal of the global anti-base erosion (GloBE) rules under Pillar Two of the package is to ensure that large multinational enterprise (MNE) groups with consolidated annual revenue of at least 750 million euros pay a global minimum tax of at least 15 per cent on income derived by their constituent entities in every jurisdiction where they operate, thereby putting a floor on competition over corporate income tax. The implementation of the global minimum tax will reduce the latitude for jurisdictions to introduce tax exemption or extremely low preferential tax rate as a means to enhance their tax competitiveness in future, thus creating a more level playing field in terms of taxation. In 2021, Hong Kong joined more than 130 jurisdictions in committing to implementing BEPS 2.0.

As announced by the Financial Secretary in the 2023-24 Budget, Hong Kong will apply the global minimum effective tax rate of 15 per cent on in-scope MNE groups starting from 2025 onwards. Only in-scope large MNE groups will be subject to the global minimum tax. The vast majority of corporate taxpayers, including local small and medium enterprises, will not be affected.

Under the global minimum tax, if the effective tax rate of an in-scope MNE group in Hong Kong is lower than 15 per cent, other relevant jurisdictions have the right to collect top-up tax in respect of the low-taxed Hong Kong MNE entities concerned. To preserve Hong Kong's taxing rights with respect to such entities instead of ceding them to other jurisdictions, Hong Kong will apply the Hong Kong minimum top-up tax (HKMTT) to in-scope MNE groups starting from 2025 onwards so that the effective tax rate of these entities will be brought up to 15 per cent. By introducing the HKMTT, in-scope MNE groups will be spared the need to pay top-up tax in every jurisdiction where they operate. This will help reduce their compliance burden.

Hong Kong will need to amend the Inland Revenue Ordinance (Cap. 112) to implement the global minimum tax and the HKMTT. To take forward the legislative exercise, a consultation exercise has been launched. A consultation paper was published on 21 December 2023 to explain the concepts of the GloBE rules, which will be strictly followed by Hong Kong and other jurisdictions, and the HKMTT, and seek views on specific implementation issues.

Patent box tax incentive

Hong Kong proposes to introduce a patent box in 2024. The tax rate for qualifying profits sourced from patents is proposed to be reduced from the current 16.5% to 5%, with a view to encouraging more research and development activities, as well as transformation and commercialization of patented inventions. The proposed legislative amendments will be introduced into the Legislative Council in the first half of 2024.

Stamp duty

The rate of stamp duty on Hong Kong share transfers has been reduced from the 0.13% to 0.1% of the transaction value payable by buyers and sellers respectively with effect from 1 December 2023. Total stamp duty is therefore now 0.2% of share transfer value. This is similar to Singapore's stamp duty rate.

Application of the MFN clause in India's tax treaties

In a long anticipated but controversial ruling, the Supreme Court of India ruled that the MFN clause in India's tax treaties cannot be applied automatically unless the Indian tax authority has issued a notification to the public that the said tax treaty MFN clause can be applied. In the same ruling, the supreme court also ruled that if the MFN clause refers to another tax treaty with an OECD member state, that this should be interpreted as meaning that the other tax treaty country is an OECD member at the time of the conclusion (signing) of the tax treaty whose MFN clause is being applied. In other words, if the reference tax treaty country was not yet an OECD member state, then the MFN clause cannot be applied with reference to that tax treaty.

Reimbursement of costs taxable

Courtesy IBFD it was reported that the Mumbai Income Tax Appellate Tribunal (ITAT), in the case of Kraft Foods Group Brands LLC vs. Assistant Commissioner of Income Tax (ITA NO. 2495/MUM/2022), rules that reimbursement of costs, in order to be non-taxable, must be supported by adequate cost allocation details and documentary evidence.

The taxpayer, a US company and a tax resident of the US, received certain payments from its related party in India, viz. Heinz India (Pvt) Ltd. (HIPL). The taxpayer provided various services to HIPL as per the Support Services Agreement (SSA). HIPL remitted partial payment to the taxpayer after deducting withholding tax (WHT) and the rest without deducting WHT stating that the same was in the nature of reimbursement of costs. The tax authorities, however, were of the opinion that the reimbursement amount was in the nature of fees for technical services under section 9(1)(vii) of the Income Tax Act, 1961 as well as article 12 of the India-United States Income Tax Treaty (1989).

The ITAT examined whether the payment made by HIPL without deducting WHT in India can be considered 'reimbursement of costs' and be, accordingly, not taxable in India. The ITAT ruled partially in favour of the taxpayer with observations set out as follows:

- the SSA prescribes a 0% mark-up on costs of performing support services, unless a different mark-up is required under the US transfer pricing (TP) rules. The taxpayer did not bring on record the relevant assessment made under the US TP rules;
- the taxpayer entered into an SSA to provide support services through various cost centres but failed to submit any details or proper factors or allocation basis to classify the various support service charges provided/collected from various affiliates, in particular HIPL. A 0% mark-up provided in SSA does not suffice as evidence;
- the reimbursement of costs is not taxable as there is no profit element embedded in such expenses which are incurred on behalf of another person. However, in the given case, there is no supporting evidence to appreciate that the taxpayer has incurred various expenses on behalf of HIPL and recovered the same from HIPL; and
- the first hurdle is proving that the amount is an actual reimbursement of costs and the claim of the exemption under domestic tax law or tax treaty comes next. The taxpayer has failed in proving the same. The taxpayer has provided services to its affiliates in India, partly claims them as chargeable to tax and the balance not chargeable, without any basis.

Foreigners to open accounts in IFSC banking units without tax registration

The Central Board of Direct Taxes has issued a notification that a tax registration number or permanent account number (PAN) is not required for non-resident taxpayers and foreign companies opening accounts in the International Financial Services Centres (IFSC) banking units, provided they file Form 60 and do not have any other taxable income in India.

- a non-resident (not being a company) or a foreign company, having no taxable income in India, is not required to quote a PAN or Aadhar number while making deposits, withdrawals or opening bank accounts with IFSC banking units; and
- a foreign company, having no PAN and no taxable income in India, can execute specific transactions with an IFSC banking unit by filing Form 60 (as amended in the same notification).

Valuation rules for the issue of equity and preference shares

Courtesy Trilegal in India, it was reported that new valuation rules for the issue of equity and preference shares to residents and non-residents have been finalised and made applicable from 25 September 2023. The Central Board of Direct Taxes (CBDT) had earlier issued a draft notification on 26 May 2023 seeking public comments on new valuation methods proposed to be prescribed for the issue of equity shares to residents and non-residents. After receiving public comments, the CBDT has now issued the Income Tax (Twenty-First Amendment) Rules, 2023 (Rules), finalising the new valuation rules, applicable from 25 September 2023, for the issue of equity shares as well as preference shares to residents and non-residents. These Rules amend Rule 11 UA of the Income Tax Rules, 1962.

The excess of the consideration received by a private limited company (PLC) for the issue of shares to residents and non-residents, over the fair market value (Tax FMV) of the shares as prescribed in these Rules, is deemed to be the income of the PLC as per the provisions of the Income Tax Act, 1961 (ITA). Such income is taxed at the corporate tax rate applicable to the PLC (Angel Tax). On the positive side, the Rules offer multiple valuation methods to determine the Tax FMV, however, the Rules do not address many issues especially those related to convertible instruments.

The Rules provide various methods for the valuation of equity shares as well as preference shares as follows:

Method	Particulars
A	Net Asset Value (**NAV**) based method
B	Discounted Cash Flow (**DCF**) method based on a report by a merchant banker
C	Price of shares issued by a venture capital undertaking to a specified fund may be considered as the Tax FMV for the issue of shares to another investor within a period to 90 days.
D	Any of the five methioned below based on a report by a report by a merchant banker: • Comparable Company Multiple Method • Probability Weighted Expected Return Method • Option Pricing Method • Milestone Analysis Method • Relpacement Cost Method
E	Price of shares issued by PLC to a notified investor may be considered as the Tax FMV for issue of shares to another investor within a period of 90 days.

The applicability of the methods mentioned above will depend on the type of investor and type of share issued, as below:

Issue of equity shares to a non-resident	Issue of equity shares to a resident	Issue of preference shares to a non-resident	Issue of preference shares to a resident
All methods	All methods exceot D	Methods B,C, D, E or based on the FMV of equity shares determined in accordance with any of the above methods.	Methods B,C, E or based on the FMV of equity shares determined in accordance with any of the above methods except D.

Safe harbour. For shares issued to investors, the issue price will be accepted as the Tax FMV for the Angel Tax provision, so long as it does not exceed the value computed using the prescribed valuation methods by more than 10%.

Where the valuation report issued by the merchant banker is dated not more than 90 days prior to the date of issue of shares, the company may choose to deem the date of the valuation report as the valuation date. The valuation date here refers to the date of the report and not to the 'valuation date'.

Rules are now restrictive for issue of preference shares: Until 25 September 2023, PLCs were allowed to use any method as deemed fit by the merchant banker for valuing preference shares. The merchant banker will now be required to use only the specified methods.

Conversion of convertible instruments not addressed: Under the Foreign Exchange Management Act, 1999 (FEMA), convertible instruments cannot be converted at a price lower than the fair value of such instruments at the time of issuance of such instruments. In a scenario where there is a drop in the valuation of the company, the Tax FMV of the shares of the PLC at the time of conversion may be lower than the price at which the convertible instruments were issued. This may result in a tax cost for the PLC under the Angel Tax provision. There may be similar implications if there is a pre-agreed conversion price that is higher than the Tax FMV computed at the time of the conversion.

Interplay of FEMA valuation and Tax FMV under Angel Tax provision not addressed: Under FEMA regulations, shares must be issued to non-residents at a value equal to or higher than the FMV whereas the Angel Tax provision prescribes a ceiling value (beyond which there would be adverse tax implications for the issuing PLC). If the FEMA FMV exceeds the Tax FMV by more than the 10% safe harbour limit discussed above, it may not be possible for the PLC to issue equity shares without incurring a tax cost.

Valuation methodologies under different laws: The valuation rules for FEMA prescribe that any internationally accepted valuation methodology may be used whereas for the Angel Tax provision only prescribed methods may be used. It will hence be necessary to use a method that satisfies both FEMA and Angel Tax provision.

Interplay of deemed income provision with Angel Tax provision not addressed: The ITA contains a Deemed Income provision in terms of which if the acquirer buys shares for a consideration lower than the FMV computed in the prescribed manner, the excess of the FMV over the consideration is taxed in the hands of the acquirer (Deemed Income). It may be noted that the valuation rules for Deemed Income provision and Angel tax provision are marginally different. It will now be necessary to compare the valuations for Angel Tax and Deemed Income provisions and understand the impact for the PLC and the investor.

Exclusion of method D for issue of shares to residents: This may cause undue hardship in a transaction as multiple reports will now be required to be obtained in case both residents and non-residents participate in the fund raise by a PLC.

Certain commonly used methods are excluded: Methods like Comparable Transaction Multiple Method, Net Asset Value based on Replacement Cost of assets, etc., are not included in the methods available under the Rules. This causes undue hardship as there can be scenarios where such commonly used methods are more suited for the valuation.

Combination of valuation methods not allowed: The PLC may not be able to use a combination of the abovementioned methods. It is very common for valuers to give weightage to multiple methods. For example, the valuer may want to attribute 50% to DCF method and 50% to NAV method. This may not be possible under amended Rule 11UA.

Requirement to have a robust valuation: Valuation of shares has always been a litigated issue. In the past, considerable tax litigation was witnessed when only two methods were prescribed. Now with more methods being prescribed, it is expected that litigation will only increase and hence it is very important to have a robust valuation.

Genuine transactions not excluded: The scope of the Angel Tax provision has increased significantly in the recent past. The CBDT should consider excluding additional categories of genuine transactions, given that the provision was introduced as an anti-abuse provision. For instance, in a capital infusion by a holding company to its subsidiary, there is no benefit arising to any third party. Such transactions have not been excluded from the purview of this provision.

The amendments to Rule 11UA should provide relief in terms of flexibility on the valuation date and methods, as well as the safe harbour of up to 10% while calculating the Tax FMV of shares. Investors and PLCs may need to carefully assess the interplay of tax laws and FEMA regulations for conversion and share issuance transactions. Further, the comfort of the Reserve Bank of India and the authorised dealer banks with new valuation methods may also need to be assessed. As the valuation reports will be subject to scrutiny from various tax and regulatory authorities, it is highly recommended to obtain a robust and consistent valuation complying with FEMA, Deemed Income provision and Angel Tax provision.

Valuation of guarantees

The Central Board of Indirect Taxes and Customs (CBIC) has issued a circular clarifying various issues on the taxability of corporate and personal guarantees in furtherance of the recommendations made by the Goods and Services Tax (GST) Council in its 52nd meeting (see GST Council Recommendations Include Valuation of Corporate Guarantees (9 October 2023).

The CBIC has issued clarifications on the taxability of personal guarantees offered by directors to a bank/ financial institution against the credit limits/loans being sanctioned to a company as set out below:

- The GST Law provides that such an activity must be treated as a supply of service, with or without consideration, and its taxable value will be the open market value of such supply. However, as per the guidelines of the Reserve Bank of India (RBI), no consideration can be paid to the director by the company, directly or indirectly, for providing a personal guarantee. Thus, the question of such supply/transaction having any open market value does not arise.
- Accordingly, the open market value of such a supply may be considered zero and there will be no GST payable on it.
- However, in cases where the director who provided the guarantee has resigned and the company pays remuneration to the director for continuance of an existing guarantee, the taxable value of such supply will be considered as the remuneration/consideration paid to the director.

The CBIC issued clarifications on the taxability of a corporate guarantee provided for related persons, including a corporate guarantee provided by a holding company to its subsidiary company, as set out below:

- The GST Law provides that such an activity must be treated as a supply of service, with or without consideration, and its taxable value will be the open market value of such supply.
- For the purpose of ensuring uniformity in the valuation of corporate guarantees, the taxable value of corporate guarantees will be determined at 1% of the amount of such guarantee offered, or the actual consideration, whichever is higher. These valuation rules will

apply irrespective of whether full input tax credit (ITC) is available to the recipient of services or not.
- These rules will not apply to personal guarantees provided by directors.

E-commerce transactions

The Central Board of Direct Taxes (CBDT) has issued a circular clarifying certain aspects when deducting withholding tax (WHT) in e-commerce transactions.

- Where multiple e-commerce operators (ECOs) are involved in a single transaction of sale of goods or services or both through an e-commerce platform and where:
  - » the seller-side ECO is not the actual seller of the said goods or services - WHT compliance is the responsibility of the seller-side ECO who finally makes the payment to the seller; and
  - » the seller-side ECO itself is the actual seller of the said goods or services - WHT compliance is the responsibility of the ECO who finally makes the payment to the actual seller of goods or services.
- Commissions, convenience fees, logistic charges and delivery fees must be included in the "gross amount" for the calculation of WHT.
- WHT will be deducted from the amount credited without including GST and other taxes levied on the sale of goods or services, provided the GST and other taxes are clearly mentioned in the invoice.
- Seller discounts (not including discounts by a buyer-side ECO or seller-side ECO) must be deducted when calculating the gross amount of the products sold or services provided.
- In cases of purchase returns, if the WHT has already been deducted before the purchase return, the WHT can be adjusted against the next transaction with the same seller in the same tax year. No adjustment is required if the purchase return is replaced with goods.

The Income Tax law provides that, where the sale of goods or provision of services of an e-commerce participant is facilitated by an ECO through its digital or electronic facility or platform, such ECO must deduct WHT at 1% of the gross amount of such sales or services or both. WHT must be deducted at the time of credit of amount of sale or services or both to the account of an e-commerce participant or at the time of payment thereof to such e-commerce participant by any mode, whichever is earlier.

Software services subject to withholding tax?

The Delhi Income Tax Appellate Tribunal (ITAT), in the case of *Service Now Nederland BV vs. Assistant Commissioner of Income Tax (ITA No.2242/Del/2022)*, has ruled that standard services provided by the taxpayer to Indian customers were not in the nature of "make available" of fees for technical services (FTS) and, accordingly, were not taxable in India under its domestic tax laws or under India's tax treaty with the Netherlands.

The taxpayer, a tax resident of the Netherlands, was engaged in the business of providing enterprise cloud computing solutions. During tax year 2019-20, the taxpayer provided subscription, training and professional services to various Indian customers and considered the income from such services to be non-taxable in India as it was not in the nature of royalties or FTS. The tax authorities, however, sought to tax such income in India as FTS.

Anti abuse measures (BEPS multilateral instrument)

On 27 November 2023, Indonesia deposited a further notification confirming the completion of its internal procedures for the entry into effect of the MLI provisions with respect to an additional 4 tax treaties, pursuant to article 35(7)(b) of the MLI. The following tax treaties have been added: Bulgaria, Mexico, South Africa, and Vietnam. A total of 37 of its covered tax agreements are now listed in the notification.

Indonesia also confirmed the completion of its internal procedures, pursuant to article 35(7)(b) of the MLI, for the entry into effect of withdrawal of a reservation under article 35(7)(a)(iii) and (iv), and for the entry into effect of additional notifi-cations under article 35(7)(a)(v) and (vi). In both cases, it concerns the tax treaty with Finland.

Indonesia added Austria, Belarus, Germany, Jordan, Kuwait, Mongolia, Morocco, Papua New Guinea, Singapore (new treaty), Sri Lanka, Tunisia, Ukraine and the United Arab Emirates (new treaty) as affected treaties by the MLI. Furthermore, Indonesia removed an amending instrument to the treaty with the Philippines. This list of affected treaties will increase as further partner countries deposit their instruments of ratification. The extent to which the MLI will modify Indonesia's bilateral tax treaties will depend on the final adoption positions taken by other countries.

Indonesia's expanded reservations and notifications list now includes 60 tax treaties to be covered by the MLI. In the consolidated version of its MLI position, Indonesia also made additional notifications to include a provision in its treaty with the Philippines under article 8 (Dividend Transfer Transactions) and to include its treaty with South Africa under article 16 (Mutual Agreement Procedure).

Incentives for import of battery-powered electric vehicles

The government has issued a regulation for the provision of incentives for the import of fully assembled battery-powered electric vehicles, including exemptions from import duties and sales tax on luxury goods.

The government has issued Presidential Regulation Number 79 of 2023 (PR 79/2023) of 8 December 2023 to revise Presidential Regulation Number 55 of 2019 (PR 55/2019) concerning the Acceleration of the Battery Electric Motor Vehicle Program for Road Transportation.

The tax incentives are applicable to companies that intend to build electric vehicle plants in Indonesia, companies that have invested in electric vehicle manufacturing facilities or intend to increase their electric vehicle production capacity.

Electric vehicle manufacturers that import fully assembled battery-powered electric vehicles and manufacturers that can speed up the domestic process for full assembly during the period of importation until 2025 are eligible for the incentives provided under PR 79/2023 such as exemption from import duties and import duties to be borne by the government, exemption from sales tax on luxury goods incentive or sales tax on luxury goods to be borne by the government; and/or exemption or reduction of local taxes.

PR 79/2023 also stipulates that battery-powered electric vehicle manufacturers must comply with the use of minimum domestic components requirements and must submit a guarantee equal to the incentive given to qualify for the incentives.

Previously, under PR 55/2019, the incentives were only available for the import of knock-down battery-powered electric vehicles.

JURISDICTION:

Japan

Technical explanation on global minimum tax (Pillar 2)

The Pillar 2 global minimum tax Income Inclusion Rule will take effect in Japan from 1 April 2024, applying to MNCs with subsidiaries or branches in Japan earning a global turnover of the equivalent of EUR 750 million annually. Courtesy IBFD, the Japanese Ministry of Finance has published its technical explanation regarding the Japanese Global Minimum Tax Laws and Regulations following their parliamentary and governmental enactment in the first half of 2023.

The authors of this technical explanation are seven finance ministry officials who work in departments involved in implementing the global minimum tax in Japan. Although these officials wrote in their personal capacity, the technical explanation is generally considered authoritative literature in practice.

This technical explanation, which is 236 pages, is primarily intended to provide an accessible overview of the newly enacted Japanese Global Minimum Tax Laws and Regulations through narrative descriptions and illustrative examples.

The technical explanation noted that the current laws and regulations do not yet reflect the administrative guidance issued in July 2023. It also points out several issues that have been flagged in the OECD Model Rule and the commentary but have not been codified yet in Japan because the details have not been finalized and are still under international negotiation, for example:

- details of the adjustments to some financial accounting standards to prevent any material competitive distortions (see (b) and (c) of the definition of the "Consolidated Financial Statements" in the Model Rule) and the treatment of permanent differences over EUR 1 million that arise from the application of a particular principle or standard (see Article 3.1.3 (c) of the Model Rule);
- details of the adjustments for the arm's length requirement to avoid double taxation or double non-taxation under the Global Anti-Base Erosion (GloBE) Rules (see paragraph 105 of the commentary on Article 3);

- details to identify the GloBE loss of a permanent establishment to be treated as an expense of the main entity (see Article 3.4.5 of the Model Rule); and
- details of the additional current top-up tax in various cases, including when constituent entities leave the multinational enterprise group.

While the technical explanation states that the sequential tax reforms to reflect them will be necessary, it does not specify a time frame.

The technical explanation also includes some brief interpretive insights. In particular, it clarifies that the existing domestic anti-abuse rules (i.e. Articles 132 and 132-2 of the Japanese Corporate Tax Act) are applicable even to the Japanese Global Minimum Tax.

Tax reform package

Courtesy IBFD, the Japanese government has approved the outline of the 2024 tax reform package. The government will submit the relevant bills to the Diet in January 2024. The tax reform package for 2024 will cover various tax areas, including the following measures regarding international tax issues.

REFLECTING ADDITIONAL OECD GUIDANCE IN THE JAPANESE GLOBAL MINIMUM TAX LEGISLATION

While Japan had codified the main rule of global minimum taxation (the income inclusion rule or IIR) by June 2023, the OECD has issued additional guidance since then. Japan generally considers the guidance to contain normative rules requiring corresponding law amendments before their domestic implementation (as opposed to interpretive advice). Thus, the forthcoming tax reform package will include amendments that reflect guidance that the OECD did not provide in time for Japan's previous legislation. It will also clarify the Japanese foreign tax credit treatment for the global minimum tax imposed by foreign countries.

FULL VAT LIABILITY REGIME FOR DIGITAL PLATFORMS

If foreign businesses carry out B2C transactions (e.g. provision of digital services or sale of digital content to Japanese consumers) through digital platforms and receive consideration thereof through the digital platforms, such transactions will be deemed to be performed by the operators of the digital platforms. Thus, the digital platform operators will be solely and fully liable for value added tax (VAT) on relevant cross-border B2C digital transactions (full VAT liability regime), and the digital platform operators must prepare detailed documentation in respect of these transactions. This regime covers digital platforms where the total consideration for the relevant transactions exceeds JPY 5 billion and will apply to transactions on or after 1 April 2025. The Japanese tax authorities will specify and publicly announce the applicable platform operators, which in turn must notify foreign businesses accordingly. With this new regime, the government intends to address non-compliant foreign businesses and estimates an annual VAT leakage of JPY 18 billion to be collected.

RESTRICTIONS ON SMALL BUSINESS VAT EXEMPTIONS TO FOREIGN BUSINESSES

For taxable periods beginning on or after 1 October 2024, foreign businesses will no longer be able to apply for the small business VAT exemption based on being below the payroll threshold (JPY 10 million). Furthermore, if a foreign entity has capital of JPY 10 million or more when commencing Japanese business, it will also no longer be eligible for the small business VAT exemption. The amendment will also expand these rules to address abuse of the small business tax exemption through establishing a new subsidiary, by making the rules applicable even if the affiliated entity of the new subsidiary has a domestic turnover below JPY 500 million, if its worldwide turnover is over JPY 5 billion.

IMPLEMENTING THE CRYPTO-ASSET REPORTING FRAMEWORK (CARF) AND AMENDMENTS TO THE COMMON REPORTING STANDARD (CRS)

The OECD published the CARF and the amendments to the CRS on 10 October 2022. Japan is one of the countries that has pledged to implement them by 2027 and the tax reform package will include relevant domestic law amendments to meet this commitment.

JAPAN'S TAX REFORM PACKAGE FOR 2024 INCLUDES THE FOLLOWING MEASURES REGARDING CORPORATE TAX INCENTIVES:

Tax Credit for Promotion of Domestic Production in Strategic Sectors

This new tax credit is available for domestic production of covered products (semiconductors, electric vehicles (EVs), green steel, green chemicals, and sustainable aviation fuels). The credit amount is basically calculated by multiplying the sales volume by a fixed amount applicable to each category of the products (e.g. JPY 400,000 per EV). However, this tax credit, together with some other incentives, will be limited to 40% (or 20% for semiconductors) of the current year's corporate tax liability, and the excess over this limitation can be carried forward for 4 years (or 3 years for semiconductors). Before applying for this tax credit, taxpayers must obtain authorization for their business plan from the relevant regulatory body by 31 March 2027. The authorization requirements will be set out in a separate act. This incentive will be available for 10 years from the authorization. The government estimates the tax cut from this incentive to be approximately JPY 219 billion annually.

"Innovation Box" Tax Incentive

This new incentive applies to income derived from the licensing or domestic selling of qualified intellectual property (in particular, patents and AI-related program copyrights obtained on or after 1 April 2024) to unrelated parties. This incentive provides a deduction equal to 30% of the domestic self-development portion of the income derived from qualified intellectual property. The "domestic self-development" portion is determined by the ratio of R&D costs directly related to the qualified intellectual property to the remaining R&D costs after excluding those without the domestic or self-development nature (such as acquisition costs, licence fees paid, expenses for testing and research outsourced to foreign affiliates, and R&D costs related to projects conducted through overseas offices). The deductible amount is also limited to 30% of total income. The incentive is available for fiscal years beginning between 1 April 2025 and 31 March 2032. The government estimates the tax cut from this incentive to be approximately JPY 23 billion annually.

R&D Tax Credit

Contrary to the two new incentives above, the existing R&D tax credit will shrink slightly. Under the R&D tax credit regime, the creditable rate is linked to the year-on-year increase or decrease in R&D costs. While this structure will remain the same, the government intends to lower the creditable rate for the reduced R&D cost setting. After 2026, this creditable rate will be reduced to 0% if the taxpayer reduces research and development expenses by 30% (or 27.5% after 2029 and 25% after 2031) or more from the previous year. The minimum creditable rate of 1% under the existing regime will be repealed. The government estimates the tax increase from this measure to be approximately JPY 23 billion annually.

The Cabinet approved the 2024 tax reform package outline (in Japanese) on 22 December 2023 following the ruling coalition's announcement (in Japanese) on 14 December 2023.

JURISDICTION:

Korea

Global minimum tax (Pillar 2)

The global minimum tax Income Inclusion Rule has taken effect in Korea on 1 January 2024. Courtesy Lee & Ko, Korea recently published new regulations containing detailed implementation guidance in regard to Global Minimum Tax (Pillar Two) ("GMT"). The new regulations are published in the Presidential Decrees to the International Tax Coordination Law and are effective January 1st, 2024.

GMT IN KOREA – A SHORT HISTORY

The OECD released its Pillar Two Model Rules (the "OECD Model Rules") on December 20, 2021, and in the same month, Korea's Ministry of Economy and Finance ("MOEF") announced that work would begin on drafting amendments to domestic legislation in order to incorporate the OECD Model Rules into Korean tax law.

In July 2022, a draft of the revisions was published by the MOEF, with which the OECD Model Rules could be incorporated into the International Tax Coordination Law ("ITCL"). The MOEF initially proposed that both the income inclusion rule ("IIR") and undertaxed payments rule ("UTPR") would take effect from January 1, 2024. However, since no other country in the world at that time was proposing to bring the UTPR into effect from 2024, there was widespread unease amongst in-scope Korean companies at the prospect of Korea being the first country in the world to implement the UTPR.

It therefore came as no surprise when in July 2023 the MOEF published a further revised draft of the ITCL, which postponed the introduction of the UTPR by one year in Korea, such that it is now scheduled to take effect from January 1, 2025 (with the IIR still coming into effect on January 1, 2024). This is in line with the implementation timeline in many other countries, especially in Europe.

On November 9, 2023, the relevant Presidential Decree was published, which contains more detailed implementing regulations that have been introduced by the OECD through a series of administrative guidelines after the initial legislation of the GMT in Korea in July 2022. This Presidential Decree took effect on January 1, 2024.

KOREAN V. OECD RULES

Similar to the UK and EU, Korea has re-drafted the OECD Model Rules and then inserted them into its domestic tax legislation, and more specifically into the ITCL. The amended Korean legislation closely mirrors the OECD Model Rules, as it should, due to the importance of consistent interpretation and implementation by participating jurisdictions under the so called "Common Approach". The Korean GMT rules are now contained within Chapter 5 of ITCL, in Articles 60-86. Key provisions include:

- the threshold for a multinational group to be in-scope (Art. 62(1));
- excluded entities (Art. 62(3));
- the IIR (Art. 72);
- the UTPR (Art. 73); and
- the de minimis exclusion (Art. 74(1)).

Prior to the amendment, Chapter 5 of the ITCL contained penalty provisions, but the penalty provisions have now been pushed back such that they constitute Chapter 6 of the ITCL (Art. 87 – 91).

The Korean version of the GMT legislation as contained within the ITCL is not self-contained legislation, but contains frequent references to the Presidential Decree. The Presidential Decree, released on November 9, 2023, contains more granular or procedural detail about how the GMT rules are to be implemented in Korea.

There are three key charging concepts in the OECD Model Rules, the first two of which are present in Korea's domestic GMT rules, namely: the IIR, the UTPR, and the domestic override, also known as the Qualified Domestic Minimum Top-up Tax or "QDMTT". Unlike the IIR and UTPR, Korea has yet to adopt the QDMTT, partly because Korea already has an unqualified minimum tax regime in place that requires an Effective Tax Rate "ETR" of at least 17%.

Other features of the Korean domestic GMT regime, such as the EUR 750 million threshold for the multinational group to be in-scope, the types of entities excluded from the regime, and the de minimis exclusion, are all broadly the same as the equivalent concepts in the OECD Model Rules.

ULTIMATE PARENT ENTITIES ("UPES") IN KOREA – GMT IMPACT

For UPEs in Korea, it will first be necessary to determine whether the UPE is part of a multinational group that is within the scope of the Korean GMT rules.

The rules apply to entities which are part of a multinational group of entities, referred to as Constituent Entities ("CEs"), when the annual consolidated revenues of the multinational group are over EUR 750 million in at least two of the four fiscal years immediately preceding the fiscal year being tested. In addition to the revenue threshold, the GMT rules only apply to entities that are not specifically prescribed as "Excluded Entities" under the rules (excluded entities include governmental entities, pension funds, international or non-profit organizations, or investment funds which are a UPE).

After determining that the rules apply, it is then necessary to perform fairly complex calculations, on an entity-by-entity and jurisdiction-by-jurisdiction basis, to determine whether the ETR is lower than 15% in any jurisdiction where the CEs of the in-scope multinational group are located.

If the ETR is lower than 15% for any CE of a multinational group, then the IIR is activated and "top-up tax" needs to be paid by the UPE in the jurisdiction of the UPE, in proportion to the UPE's ownership interests in the CE that is subject to an ETR of less than 15%. To the extent that the CE with a low ETR is owned by a UPE in Korea, the "backstop rule", i.e. the UTPR, will not apply. This is because the UTPR only applies where the under-taxed entity is held through a chain of ownership that does not result in income being taxed under the IIR; but since Korea has implemented the GMT rules, whenever the UPE of an undertaxed CE is located in Korea, then under-taxed income will be taxed under the IIR in Korea.

As far as domestic compliance in Korea is concerned, all domestic CEs that are part of a multinational group will have to submit to their local tax office in Korea: (i) a Global Anti-Base Erosion "GloBE" Information Return; and (ii) a Top-up Tax Allocation Return. During the first year of application, these reports will have to be submitted within 18 months from the end of the year to which the reports apply, and thereafter, within 15 months. In other words, the first such reports will need to be submitted in Korea by June 30, 2026, in respect of the business year January 1, 2024 – December 31, 2024.

TRANSITIONAL SAFE HARBOURS

Korea's GMT rules, following the OECD Model Rules, contain transitional CbCR Safe Harbour provisions that will apply to business years beginning on or before December 31, 2026, and ending on or before June 30, 2028.

The safe harbour conditions involve simpler calculations, derived from a smaller pool of data, as compared with the default calculation methods set out in the GMT rules. Also, the data that is required under the safe harbour conditions is for the most part already available.

The safe harbour conditions set out three different routes by which the top-up tax arising from a specific jurisdiction will be deemed to be nil, even if some top-up tax would have been due by operation of the regular GMT rules. Specifically, if any of the three following conditions are satisfied, then the top-up tax in that jurisdiction will be deemed to be nil:

1. De Minimis Condition: in respect of all CEs in a certain jurisdiction, the jurisdiction has: (i) average revenues of less than EUR 10 million; and (ii) a profit (loss) before income tax ("PBT") of less than EUR 1 million; or
2. Simplified ETR test: a simplified version of the ETR calculation, which should be calculated by dividing the income tax expense accrued by the profit before income tax, results in an ETR of less than 15% in 2024, 16% in 2025, or 17% in 2026; or
3. Routine Profits test: the PBT in respect of all CEs in a certain jurisdiction is smaller than or equal to the amount of the Substance-based Income Exclusion (or substance carve-out), which is equal to 10% of qualified payroll costs and 8% of qualified tangible assets, with these carve-out percentages declining to 5% over time.

JURISDICTION:

Malaysia

Tax changes in budget 2024

The Prime Minister and Minister of Finance presented the Budget for 2024 to the parliament on 13 October 2023. The Budget announced the implementation of the global minimum tax, capital gains tax on disposal of unlisted shares, tax on high-value goods and an increase in service tax. The tax proposals were contained in the Finance (No 2) Bill 2023 issued on 7 November 2023, which was passed by the Dewan Rakyat on 28 November 2023 without any material changes. The key tax changes are discussed below.

CORPORATE TAXATION

- The introduction of a capital gains tax on gains from the sale of equities for corporates (this is discussed elsewhere in this bulletin).
- The global minimum tax will be implemented in 2025 for MNCs with a global turnover of the equivalent of 750 million euros annually.
- Tax incentives will be implemented for investments in the Pengerang Integrated Petroleum Complex and various tax incentives will be introduced, among others, for environmental, social and governance-related expenditures and Islamic financial activities under Labuan International Business and Financial Centre.

TAX ON HIGH-VALUE GOODS

- Tax will be introduced on certain high-value goods such as jewellery and watches at the rate of 5%-10%.

SERVICE TAX

- Service tax will be increased from 6% to 8%. The scope of taxable services will be expanded to include logistics, brokerages, underwriting and karaoke services. The rate increase will not affect the tax rate on food and beverages and telecommunication services, which will continue to be taxed at 6%.

E-INVOICING

- E-invoicing will be made mandatory for taxpayers with annual revenue of more than MYR 100 million from 1 August 2024. It will be gradually implemented to all taxpayers over the next two years. The e-invoicing means that in scope businesses must have their invoices validated by the IRBM before invoices are issued to customers. In principle it will not apply to B2C transactions except for a number of prescribed business sectors, such as airlines (tickets), construction, jewelry, automotive sector.

OTHER MEASURES

- Stamp duty of 4% will be imposed on the transfer of ownership of real estate by non-citizen individuals and foreign-owned companies (except permanent residents in Malaysia).
- A visa liberalization plan will facilitate the approval of employment passes for strategic investors in certain sectors.

Capital gains tax introduced for companies

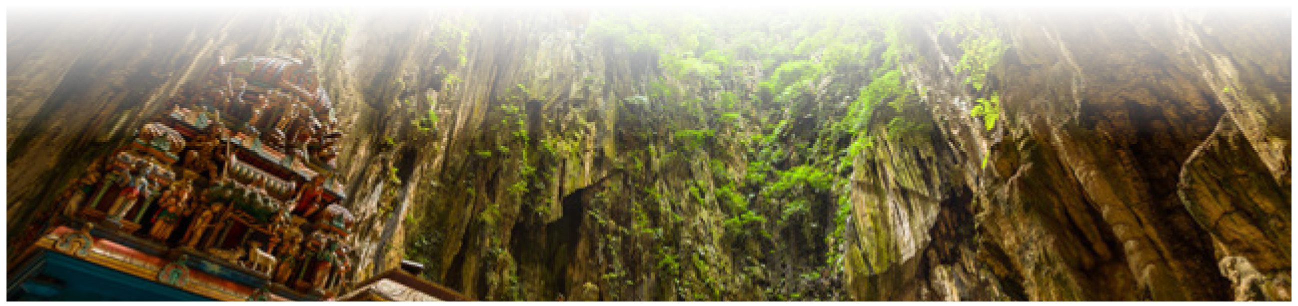
Capital gains tax will be due by corporates, LLPs, trust bodies and Co-operatives at the rate of 10% on the net gain or 2% of the gross sales proceeds of the disposal of unlisted shares from 1 March 2024 unless the said shares were acquired by the seller on or after 1 January 2024, in which case the rate will be 10% on the net gain.

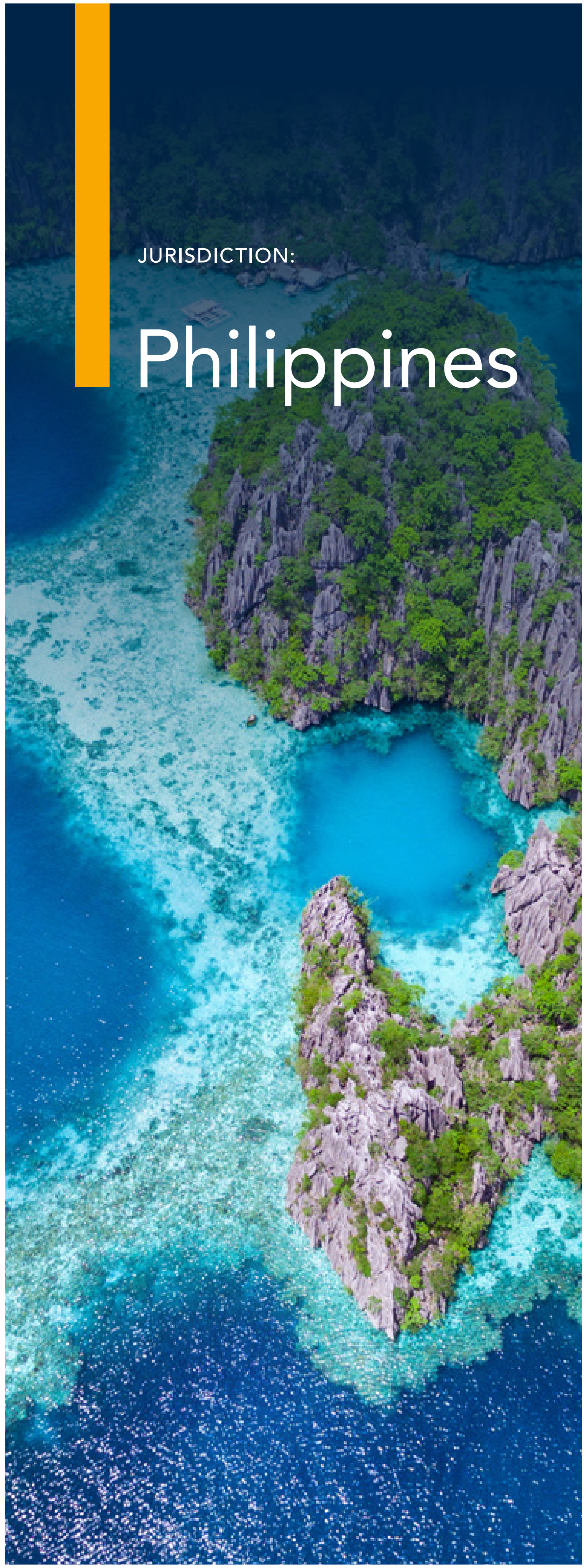
Gains derived from the sale of offshore capital assets received in Malaysia have also become taxable albeit at an income tax rate of 24%, unless the seller has sufficient economic substance in Malaysia. No capital gains tax will be due by individuals.

The new tax on capital gains has taken effect on 1 January 2024 and includes gains from a sale of any offshore asset received in Malaysia or a sale of unlisted shares, debentures or loan stock in Malaysian companies regardless of whether such was received in Malaysia. It will also cover any gain on the sale of shares of a controlled company, whether foreign shares or Malaysian company shares, whose tangible assets are derived for at least 75% of real property assets in Malaysia (land, buildings or rights to land).

As of 1 January 2024 it has become relevant whether a corporate shareholder of a Malaysian company is located in a favourable double tax treaty jurisdiction unless the Malaysian company predominantly owns real property assets in Malaysia. Real Property Gains Tax will continue to be due by transfers of real property or shares in a Real Property Company by individuals, but it will be replaced by the abovementioned capital gains tax for transferors who are corporates, Co-operates trust bodies or LLPs. The capital gains tax has to be reported in a tax return and paid by the 60th day after the taxable date of the sale by the transferor and records of any sales must be kept for seven years. Sales by venture capital companies, sales done in the context of an IPO approved by Bursa Malaysia and qualifying internal reorganisations are exempted from the capital gains tax.

On 29 December 2023, Exemption Order 7/2023 was issued which states that sales of unlisted shares of Malaysian companies will be exempt from income tax between 1 January and 29 February 2024. Effectively therefore, the new capital gains tax on the sale of unlisted shares of Malaysian companies will apply from 1 March 2024. Interestingly the Exemption Order also applies to Malaysian real property companies. This provides investors with a unique opportunity in restructuring their real property companies holding structure without incurring the Malaysian real property taxes provided they do so before 1 March 2024.





Anti avoidance measures

According to a press release of 10 November 2023, published by the OECD, the Philippines has joined the Inclusive Framework (IF) for the global implementation of the Base Erosion and Profit Shifting (BEPS) Project. The IF was proposed by the OECD (see OECD releases final BEPS package – summary (5 October 2015) and OECD: proposal for broadening participation in BEPS Project to all interested countries and jurisdictions (24 February 2016)) and endorsed by the G20 in February 2016. The IF has now been joined by a total of 144 countries. Under the framework, all state and non-state jurisdictions that commit to the BEPS Project will participate as BEPS Associates of the OECD's Committee on Fiscal Affairs.

Through its membership, the Philippines has also committed to joining the two-pillar plan to introduce the global minimum tax., bringing to 140 the total number of jurisdictions participating in the agreement.

Taxation of e-marketplace operators and digital financial services providers

The Bureau of Internal Revenue (BIR) will impose a withholding tax on gross remittances made by electronic marketplace operators and digital financial services providers to online sellers or merchants for goods and services sold through the operators' or providers' online platform or facility.

The withholding tax is 1% of 1/2 of the gross remittances made by the e-marketplace operator or digital financial services provider to the seller or merchant. It will not apply in the following cases:

- the annual total gross remittances to an online seller or merchant for the past taxable year has not exceeded PHP 500,000;
- the cumulative gross remittances to an online seller or merchant in a taxable year has not yet exceeded PHP 500,000; or

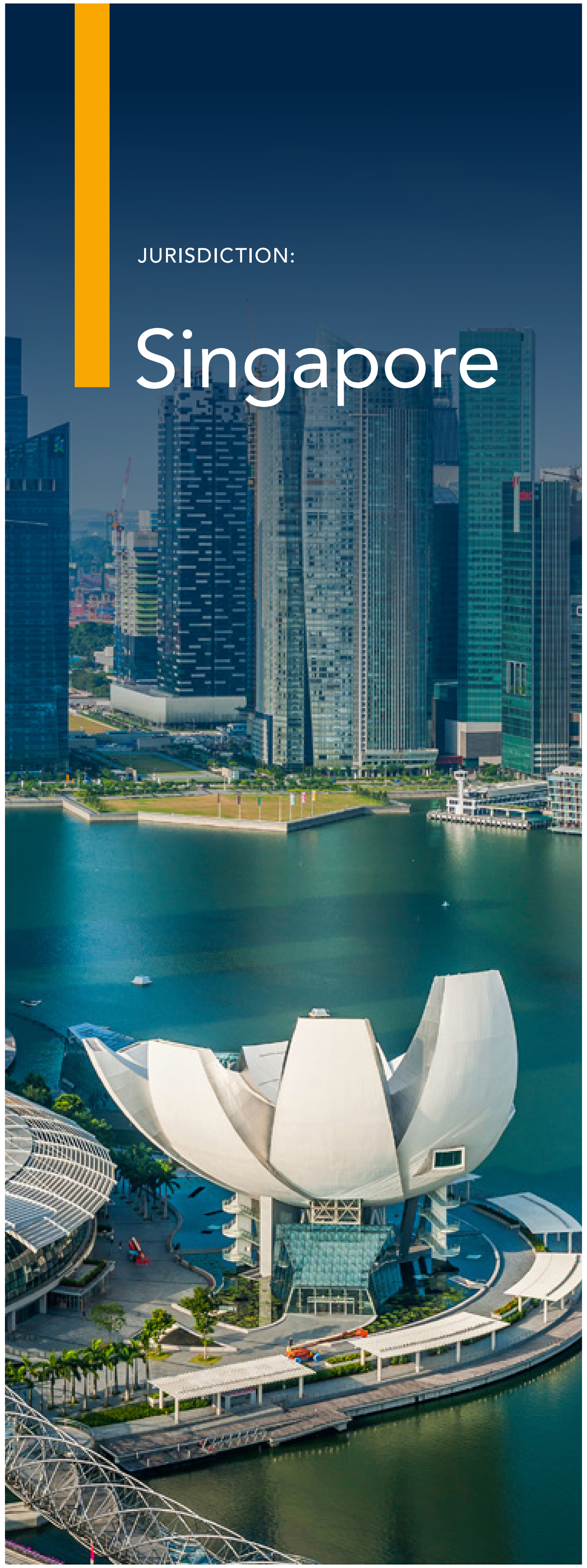
- the seller or merchant is duly exempt from, or subject to, a lower income tax rate pursuant to any existing law or treaty, provided that the concerned seller or merchant is able to secure the necessary certification, clearance, ruling or any other document proving its entitlement to such exemption or lower tax rate. Such proof must be provided to the e-marketplace operator or digital financial services provider.

The withholding tax under the new subsection X of section 2.57.2 of Revenue Regulations (RR) No. 2-98, as amended, will be in addition to existing withholding tax obligations being imposed on e-marketplace operators and digital financial services providers, such as, inter alia, withholding taxes on payments to transportation contractors for the carriage of goods and merchandise.

E-marketplace operators and digital financial services providers will be constituted as withholding agents under section 2.57.3 of RR No. 2-98, as amended.

"Gross remittances" excludes sales returns and discounts, delivery or shipping fees billed separately, VAT and consideration for the use of the e-marketplace and/or digital financial services platform.

The definitions of "e-marketplace" and "digital financial services platforms" are provided in RR No. 16-2023, which was published on 27 December 2023. RR No. 16-2023 will come into effect 15 days after the publication date. The BIR will issue further guidance to prescribe the implementation procedure and timeline.



JURISDICTION:

Singapore

New capital gains tax and guidance on economic substance

The IRAS issued an e-Tax guide on 8 December 2023 on the topic of taxation of gains from the sale of offshore assets (the new s.10L ITA, which took effect on 1 January 2024). Based on s.10L, any gains on the sale of offshore assets received or deemed received in Singapore by in scope entities will be taxable unless the company has sufficient economic substance in Singapore (we refer to the previous edition of this bulletin for more details). With effect from 1 January 2024 any gains derived by companies from the sale of shares or other equities or other assets which have their source outside Singapore are subject to (17%) income tax if the gain is received or deemed received in (remitted to or deemed remitted to) Singapore unless the recipient has sufficient economic substance in Singapore. This e-Tax guide, inter alia, discusses the IRAS views on how the economic substance requirement ("ESR") will be satisfied if the company in Singapore is a Pure Equity Holding Entity ("PEHE") or a non-PEHE. This guide also covers the situation for exempt private equity and private credit funds. You may check the following link: https://www.iras.gov.sg/media/docs/default-source/e-tax/tax-treatment-of-gains-or-losses-from-the-sale-of-foreign-assets.pdf?sfvrsn=a0e0458b_7

With respect to PEHEs, i.e. all entities doing more than just holding equities and which earn dividends or gains (ancillary other income is permitted, such as bank interest on bank balances and foreign exchange gains arising from dividends or similar payments, sale or disposal of shares, and bank interest income) the e-Tax guide confirms that the Singapore holding company can outsource its compliance and regulatory reporting requirements to an external or affiliated service provider in order to meet the economic substance test provided that the company's director(s) in Singapore take investment and divestment decisions for the entity in Singapore. This section is relevant also for private equity funds exclusively investing in equities. It is useful to note the following example provided by IRAS on this point:

Example: Company F is a pure equity-holding entity incorporated in Singapore. It holds shares in an investee entity outside Singapore. While Company F engages a service provider in Singapore to handle its filing matters, it only has one nominee director in Singapore. The management of its equity investments, including decisions to buy or sell, are undertaken by the company's directors outside Singapore. Since Company F does not carry out its core economic activities in Singapore, it is not able to meet the economic substance requirement.

It is important to ensure that the board of directors of the Singapore company at least contains one individual who is authorised to take investment decisions for the company in Singapore or that the functions are outsourced to another affiliate or external service provider.

The IRAS confirms that if a PEHE holds shares of a subsidiary Singapore PEHE SPV, that it will be sufficient that the PEHE satisfies the abovementioned ESR provided that it defines the core investment strategy of the SPV. The SPV does not need to satisfy the ESR for purposes of qualifying for tax exemption on the gains under s.10L ITA. If the SPV in turn is an intermediary holdco SPV holding another Singapore SPV, then the same will apply to the latter SPV.

It should be noted however that the actual substance requirements of the SPV will ultimately be dictated by the jurisdiction of the companies held by the SPV – for example, if the Singapore sub PEHE SPV holds shares of an Indonesian PT then it will be required to meet the Indonesian economic substance requirements in order to enjoy the tax treaty benefits. Similarly with equity investments in Vietnam, China, Japan, Korea, India.

With respect to non-PEHE's, i.e. those entities who do more than just holding equities mentioned above, the economic substance requirement will be determined based on an analysis of the entity's core income generating activities in Singapore. To meet the economic substance requirement, the entity is required to satisfy all the following conditions in the tax year in which the sale or disposal occurs:

- the operations of the entity are managed and performed in Singapore (whether by its employees or outsourced to third parties or group entities); and
- the entity has adequate economic substance in Singapore, taking into account the following considerations: i) the number of full-time employees (the number of full-time employees includes full-time equivalent of part-time employees; for example, two part-time employees with daily working hours of 4 hours each will be considered one full-time employee) of the entity (or other persons managing or performing the entity's operations) in Singapore; ii) the qualifications and experience of such employees or other persons; iii) the amount of business expenditure incurred by the entity in respect of its operations in Singapore; iv) whether the key business decisions of the entity are made by persons in Singapore.

THE IRAS GIVES THE FOLLOWING EXAMPLES (ALL NUMBERS ARE IN S$):

Example 1:

Company G is an investment holding entity in Singapore that mainly invests in equities and provides loans to its related parties. As Company G provides loans in addition to investing in equities, it is a non-pure equity-holding entity. Company G disposes some shares in a foreign company in 2024. Company G has two full-time employees with relevant qualifications to manage the investments in Singapore and they make decisions in relation to the company's investments and financing arrangements. It also incurs $100,000 of local business expenditure (rental, salaries, statutory expenses) in 2024. It will be considered to have met the economic substance requirement in 2024.

Example 2:

Company H is a small entity with an annual turnover of less than $5 million. It is not a pure equity-holding entity or an investment holding entity. It disposes some foreign assets in 2024. It employs one full-time employee in Singapore to carry out its core income generating activity and make key business decisions. It also incurs $50,000 of local business expenditure in 2024. It will be considered to have met the economic substance requirement in 2024.

The IRAS confirms an important practical point for non-PEHEs which is highly relevant for (inter alia) credit and private equity funds using holding companies which (also) lend moneys to portfolio companies or other holding companies in the structure: the economic substance requirement takes into account outsourcing arrangements where an entity outsources some or all of its economic activities to third parties or group entities. For an outsourcing arrangement to satisfy the economic substance requirement, the following conditions must be satisfied:

- the economic activities are to be carried out by the outsourced entity in Singapore;
- the outsourcing entity has a direct and effective control over the outsourced activities carried out by the outsourced entity on its behalf (i.e., the outsourcing entity has exercised adequate monitoring (the monitoring mechanism should be documented in an outsourcing agreement or internal policies of the outsourcing entity; the documents could include relevant email correspondences) and control of the economic activities carried out by the outsourced entity); and
- the outsourced entity providing the outsourced services must set aside dedicated resources (e.g., manhours) to provide the outsourced services.

When determining whether the outsourcing entity is able to satisfy the economic substance requirement in respect of its economic activities, the resources of the outsourced entity in Singapore will be considered. It is generally expected to charge the outsourcing entity an arm's-length fee for the activities performed, subject to transfer pricing rules where applicable. The outsourced entity can provide support to more than one entity, provided that its resources are commensurate with the complexity and level of services it provides to other entities. Here, the IRAS is saying that the non-PEHE will meet the ESR if it outsources its key income generating activities to another party in Singapore so long as the latter has the resources to meet the manpower and expenditure tests and charges an arm's length fee for the services.

The e-Tax guide provides details on administrative requirements in order to establish the gain that would be subject to tax and that tax credits are in principle available for any overseas income tax incurred on the sale of the offshore assets. Finally, annex B of the e-Tax guide contains guidance on the scope of the key income generating activity of certain business sectors for purposes of the ESR.

Goods & services tax

With effect from 1 January 2024 the standard GST rate has increased from 8% to 9%.

Safe harbour interest rate under related party loans

At the start of 2024 the IRAS has published the safe harbour interest rate for related party loans not exceeding S$15 million. The rate is the base reference Risk Free Rate (RFR) plus 2.2% (220 basis points). Parties may choose to apply this safe harbour interest rate or conduct a transfer pricing analysis to support their related party loan terms and conditions.

Tax residency of companies

The Inland Authority of Singapore (IRAS) has updated its guidance on determining whether a company is a tax resident in Singapore in instances where technology allowing virtual participation is used in Board of Directors meetings.

Generally, a company is considered a Singapore tax resident for a year of assessment if the control and management of its business was exercised in Singapore in the preceding calendar year. The location of the company's Board of Directors meetings where strategic decisions are made usually determines where control and management are exercised. In certain cases, holding Board of Directors meetings in Singapore may not be sufficient and IRAS will consider all the facts provided by the company to decide.

IRAS has clarified that a Board of Directors meeting which involves the use of virtual meeting technology will generally be regarded as having strategic decisions made in Singapore if:

- at least 50% of the directors with the authority to make strategic decisions are physically present in Singapore during the meetings; or
- the Chairman of the Board of Directors, if the company has such an appointment, is physically present in Singapore during the meeting.

Tax arrangement with the USA

On 19 October 2023, Senate Finance Committee Chairman Ron Wyden (D), Ranking Member Mike Crapo (R), House Ways and Means Chairman Jason Smith (R) and Ranking Member Richard Neal (D) proposed the bicameral, bipartisan legislation, which aims to address double taxation between the United States and Taiwan and builds upon legislation unanimously approved by the Senate Finance Committee in September 2023.

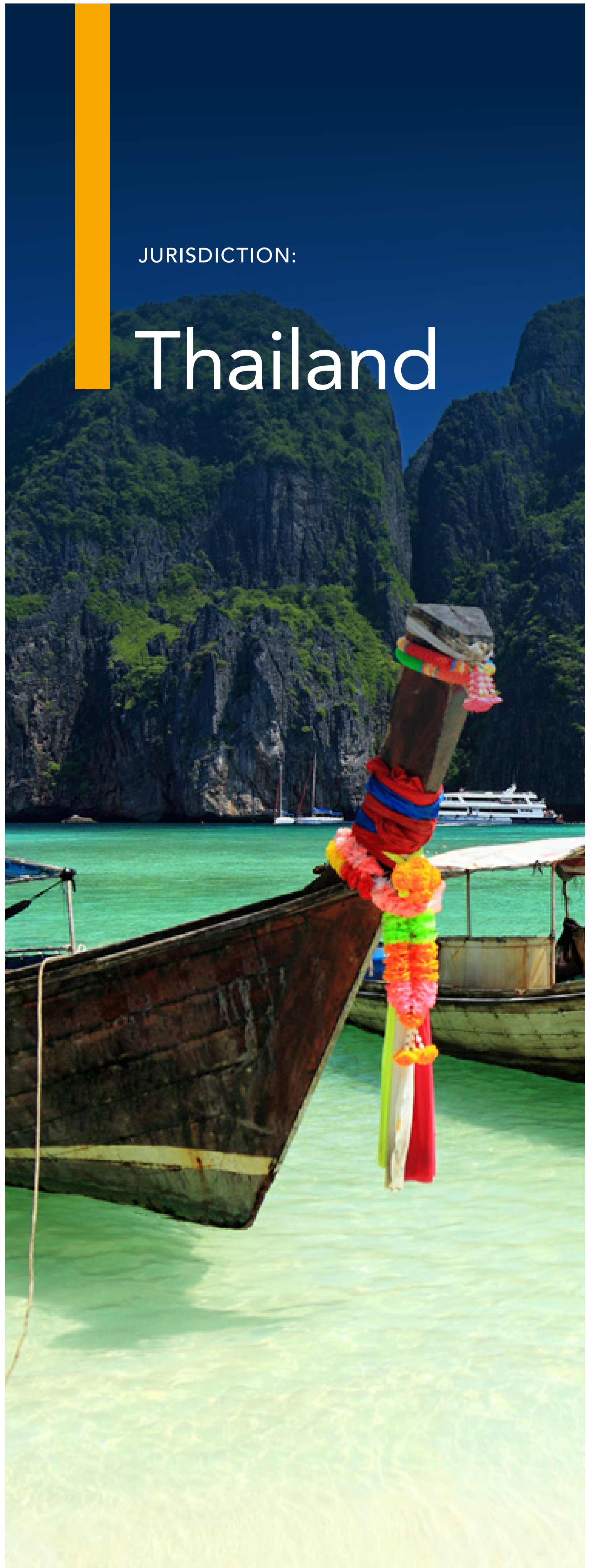
The bill would amend the Internal Revenue Code (IRC) by creating a new section 894A to provide substantial benefits to qualified Taiwan residents, similar to those provided in the 2016 United States Model Income Tax Convention. The provisions would fall into four primary categories:

- reduction of withholding taxes;
- application of permanent establishment rules;
- treatment of income from employment; and
- determination of qualified residents of Taiwan, including rules for dual residents.

Since the bill would require full reciprocal benefits, it would not come into full effect until Taiwan provides the same set of benefits to US persons with income subject to tax in Taiwan, similar to the reciprocal operation of a tax treaty.

International tax developments

Korea. On 27 December 2023, the Korea - Taiwan Income Tax Agreement entered into force. The agreement generally applies from 1 January 2024 for withholding and other taxes.

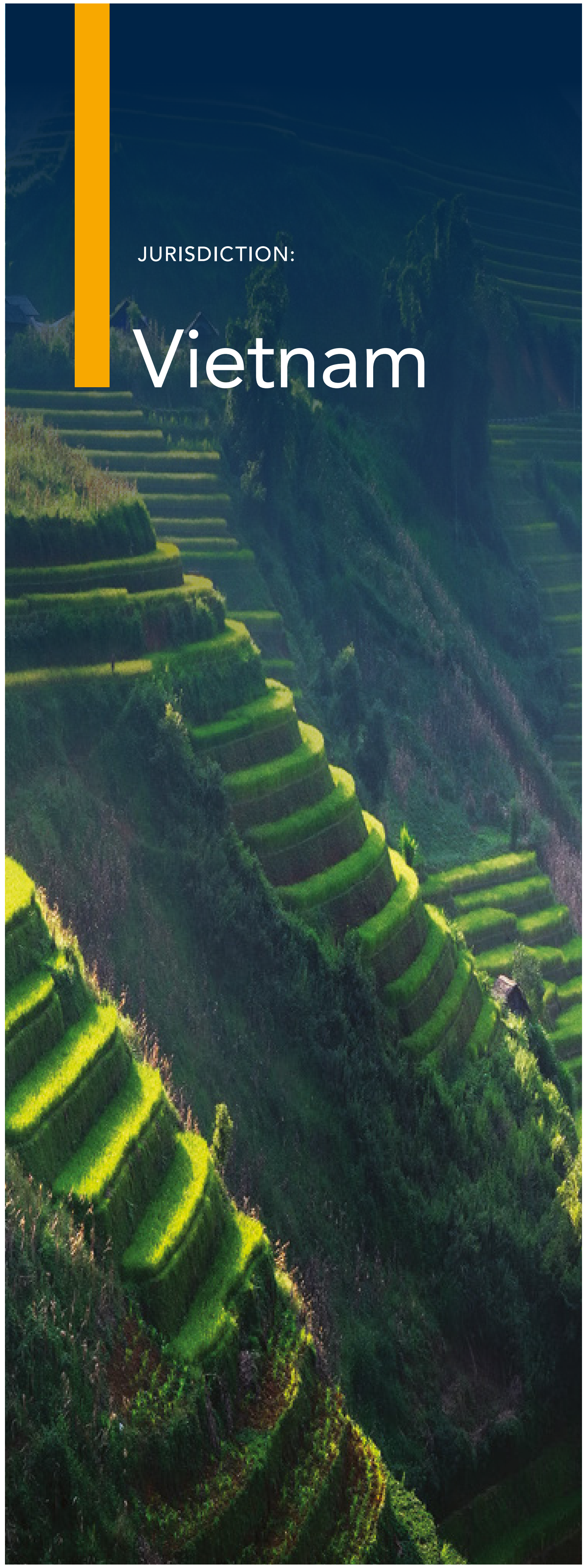


Clarification of foreign sourced income remitted to Thailand

On 20 November 2023, the Thai Revenue Department issued Departmental Instruction No. Por 162/2566 ("DI No. 162/2566") to further clarify the enforcement of Section 41 Paragraph 2 of the Thai Revenue Code, based on the interpretation provided in Departmental Instruction No. Por 161/2566 ("DI No. 161/2566").

Previously, DI No. 161/2566 was issued to provide interpretation of Section 41 Paragraph 2 that any foreign-sourced income brought into Thailand from 1 January 2024 onwards will be subject to Thai personal income tax, regardless of the tax year in which the income was derived.

DI No. 162/2566 was issued to clarify that the interpretation provided in Clause 1 of DI No. 161/2566 should not apply to foreign-sourced income derived before 1 January 2024. Accordingly, it could reasonably be assumed that the foreign-sourced income derived by a Thai tax resident before 1 January 2024 should be subject to the previous interpretation, i.e. the said income should not be subject to Thai personal income tax unless it is brought into Thailand in the *same* year in which the income is derived. This should ease the burden on taxpayers planning the remittance into Thailand of foreign-sourced income that had already been derived prior to the issuance of DI No. 162/2566.



JURISDICTION:

Vietnam

Global minimum tax (Pillar 2)

The global minimum tax rules applicable to the Income Inclusion Rule have taken effect in Vietnam on 1 January 2024. However, the government has not provided any public guidance note on this development yet. On 29 November 2023, the National Assembly approved the resolution on the application of a global minimum tax in Vietnam from 2024. Approximately 122 foreign corporations will be covered by the new tax rules.

The resolution was approved at the 6th session of the 15th National Assembly. A separate resolution on the pilot application of investment support policies for high technology companies, which was intended to supplement the resolution on the global minimum tax, has not been approved at this time. Instead, the government has been assigned to develop a draft decree in 2024 to establish an investment support fund financed by global minimum tax revenues and other sources to support businesses and attract target investments.

VAT rate reduction

On 29 November 2023, the National Assembly approved the proposal to reduce the VAT rate from 10% to 8% for the period 1 January 2024 through 30 June 2024. The reduced VAT rate will however not apply to the supply of goods and services in the following sectors: telecommunications, information technology, finance, banking, securities, insurance, real estate, metals, prefabricated metal products, mining products (excluding coal mining), coke, refined petroleum, chemical products and special sales taxes.

International tax developments

Korea. On 10 September 2023, the amending protocol, signed on 5 December 2022, to the 1995 agreement on mutual administrative assistance in customs matters between Korea and Vietnam, entered into force.

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