Asia Tax Bulletin

Autumn 2023

In This Edition

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

Dear Reader,

As we entered the last quarter of 2023, before you is tax news about the third quarter of the year. As in the previous editions, the news covers a variety of topics depending on the jurisdiction you are interested in. A common theme this time round is the adoption by many Asian countries of the OECD's Pillar 2 measures (a global minimum effective corporate tax rate of 15% for large MNCs) and announcements of the introduction of a Qualifying Domestic Minimum Top Up Tax. Furthermore, pursuant to the EU's Code of Conduct in tax matters, Hong Kong, Singapore and Malaysia are changing their domestic taxation rules applicable to gains derived from the sale of offshore assets (in the case of Malaysia: the sale of shares) with effect from 1 January 2024. This will force international groups to reconsider the tax efficiency of their existing holding structures. Some may want to increase the economic substance of the holding company, others may want to move their holding activities to a different location.

We wish everyone happy reading in these turbulent times.

Pieter de Ridder

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JURISDICTION:

China (PRC)

Preferential Income Tax Policy for Individuals

On 18 August 2023, the PRC Ministry of Finance and the State Administration of Taxation jointly released *Announcement No. 29* (“***Announcement 29***”) and *Announcement No. 30* (“***Announcement 30***”) to further extend the expiration date of preferential Individual Income Tax (“**IIT**”) policies on certain benefits granted to foreigners and annual bonus of PRC tax residents from 31 December 2023 to 31 December 2027. The extension is good news for both foreigners working in China and all Chinese tax resident individuals.

According to the circular *Caishui [2018] No. 164* (“***Circular 164***”), the housing allowances, the language training allowances, and the children’s education allowances granted to foreigners were originally exempt from PRC IIT until 31 December 2021. *Announcement [2021] No. 43* further extended the expiration date of the policy to 31 December 2023 and now the newly issued ***Announcement 29*** extends the expiration date of this policy for additional 4 years to 31 December 2027.

According to *Circular 164*, the annual bonus granted to PRC tax resident individuals could continuously be excluded from the annual salary incomes and taxed separately and such policy was originally valid until 31 December 2021. The “separate taxation” allows that the marginal IIT rate applicable to only 1/12 of the annual bonus amount can be used for calculation of IIT for the entire annual bonus. *Announcement [2021] No. 42* extended the expiration date of this policy to 31 December 2023 and now the newly issued *Announcement 30* further extends the expiration date of this policy for 4 years to 31 December 2027.

For the immediate future, the uncertainty of IIT treatments of certain benefits granted to foreigners and annual bonus of PRC tax residents has gone.

We have noticed that some enterprises have already amended the employment contracts with their employees (especially the expatriates) to reallocate the IIT cost bearing between the employer and the employee, based on the assumption that the underlying preferential IIT policies will be stopped from 2024 onwards. Considering that the expiration dates of the underlying preferential IIT policies are extended, the following applies:

- if an enterprise has not yet concluded an amended employment contract with the employees to factor in the potential change of the IIT policies, no further action is necessary now;
- if an enterprise has already concluded an amended employment contract with the employees to reallocate the IIT cost bearing, the enterprise may consider terminating the amendments and re-instate the original unamended employment contracts.

The extension of the preferential policies shows that China continues to be interested in providing a good investment surrounding for foreign investors. Further, China currently may not want to negatively influence domestic consumption by increasing IIT burden of tax residents. It is not clear yet whether the underlying preferential IIT policies will be further extended after 2027. In the long run, employers should still consider adjusting the remuneration structure to reduce the overall tax burden, if necessary, re-visit the company’s overall compensation policy and make corresponding adjustments due to the potential changes of IIT policies, especially when concluding employment contracts with foreign employees for a term longer than 4 years.

Foreign Investment and Foreign Income Reporting

Courtesy of IBFD it was reported that the State Taxation Administration (STA) has announced changes to the reporting obligations in respect of foreign investment and foreign income to reduce the administrative burden.

In 2014, the STA issued STA Announcement [2014] No.38 on the reporting forms on foreign investment and foreign income for resident enterprises. The 2014 Announcement has now been superseded by the STA Announcement [2023] No. 17, which merges two separate forms (the form on participation in foreign enterprises and the form on controlled foreign enterprises) into one and cuts the reporting items from 57 to 28. The reporting frequency has also been reduced to once a year when filing the annual tax return, instead of every advance payment of enterprise income tax.

The 2023 Announcement provides that a resident enterprise or a partner in a partnership that directly or indirectly holds at least 10% equity interest or voting rights in a foreign enterprise at any time of a tax year must submit the simplified report form “Resident Enterprise’s Report Form on Overseas Investment”. Foreign enterprises that derive income outside China through their (permanent) establishments in China with which that foreign income is connected must also comply with this reporting obligation as well. In addition, the Announcement sets out how to calculate the 10% shareholding in the case of indirect shareholding and partnership, and the new form in Chinese is attached to the Announcement.

The 2023 Announcement takes effect as from 10 October 2023 and applies to tax year 2023 and onwards. With the publication of this Announcement, articles 76, 77 and 79 of the Notice on Special Tax Adjustments (Guo Shui Fa [2009] No.2) and Announcement of the STA [2014]] No. 38 are abolished.

Preferential Tax Treatment of Stock Incentive Schemes of Listed Companies

For purposes of individual income tax, the total amount of income derived by a resident individual from stock options, stock appreciation, restricted shares and stock awards granted by a listed company may not be included in comprehensive income, but must be calculated and taxed separately at the same tax rates applicable to comprehensive income, provided that the requirements laid down in the following circulars are met:

- Circular [2005] No. 35 (on individual income tax treatment of stock options);
- Circular [2009] No. 5 (on individual income tax treatment of stock appreciation and restricted shares);

- Circular [2015] No. 116 (on Expanding of the Tax Policy for National New Innovation Model Zones nationwide); and
- Circular [2016] No. 101 (on Improving Income Tax Policy of Equity Incentives and Bringing in Technology as Capital Contribution).

Where a resident individual receives stock incentives two times or more within a tax year, the income is aggregated in calculating the taxable income.

The tax payable is calculated as follows:

tax payable = (income from stock incentive scheme × applicable tax rate) – quick calculation deduction

This individual income tax treatment is an updated version promulgated in Announcement of the Ministry of Finance and the State Taxation Administration [2023] No. 25 and applies until 31 December 2027. The original tax concession for income from stock options granted by listed companies was set to expire on 31 December 2023.

Stamp Duty

From 28 August 2023, stamp duty on securities is reduced by half, from the statutory rate of 0.1% to 0.05%.

This reduction is promulgated in Announcement of the Ministry of Finance and the State Taxation Administration [2023] No. 39.

Deed Tax Exemption Extended

China has extended the deed tax exemption on restructurings that was set to expire by the end of 2023 under Circular [2021] No. 17. From 1 January 2024 to 31 December 2027, changes in legal forms (for example, a conversion of an unincorporated business into a limited liability company), mergers, divisions, bankruptcies, transfers of assets between enterprises with the same investor, conversions of debt to equity and transfers of shares will continue to be exempt from deed tax (Announcement of the Ministry of Finance, State Taxation Administration [2023] No. 49 on 22 September 2023).

Tax Incentives for Foreign Individuals on Commodity Options Extended

The income derived by foreign individuals from options on commodities such as raw oil and other commodities whose accessibility to overseas individuals are approved by the State Council is currently exempt from individual income tax. This exemption will continue to apply until 31 December 2027 (Announcement of the Ministry of Finance, the State Taxation Administration, and the China Securities Regulation Commission [2023] No. 26).

Business transactions on the same commodity options (accessible to overseas individuals) are also exempt from value added tax until 31 December 2027 (Announcement of the Ministry of Finance and the State Taxation Administration [2023] No. 21). In the case of commodities the import or export of which has occurred, the prevailing taxation of goods of import or export will apply. In respect of goods deliveries not falling within bonded zone protection the Circular on Detailed Rules of Value Added Tax Collection on Commodities Options [Guo Shui Fa [1994] No. 244] applies.

Individual Income Tax Incentives for Greater Bay Area Extended

Subsidies granted by the local governments of Guangdong Province and Shenzhen municipality to attract high-level talents and talents in short supply are currently exempt from individual income tax, and the exemption will continue to apply until 31 December 2027 (Circular [2023] No.34).

The exemption is granted to talented foreign experts (including experts from Hong Kong, Macau and Taiwan) working in the so-called Greater Bay Area and was set to expire by the end of 2023.

Individual Income Tax Exemption of Capital Gains on Hong Kong Listed Shares Extended

China has extended the exemption on gains on the disposal of shares listed on the Hong Kong Stock Exchange through the Shanghai-Hong Kong Stock Connect and the Shenzhen-Hong Kong Stock Connect, and gains from the trading of participations in Hong Kong securities investment funds derived by Chinese individual investors through recognized investment funds. Such gains will continue to be exempt from individual income tax in China until 31 December 2027 (Announcement of the Ministry of Finance, the State Taxation Administration, China Securities Regulation Commission [2023] No. 23). The exemption was set to expire on 31 December 2023.

Reliefs for Settlements of Debts with Properties Extended

China has extended the tax reliefs available to financial institutions and financial asset management companies in the settling of distressed debts of borrowers to the end of 2027.

The reliefs were set to expire on 31 July 2023, and allow financial institutions in the banking business and financial asset management companies established in China that are general taxpayers of value added tax (VAT) to continue to take the acquisition price (plus any additional acquisition expenses that are not included in the price) less the agreed price of bad debt settlement as the sale proceeds for VAT purposes and apply a 9% VAT rate. Taxpayers electing to do so must be in possession of relevant documentation of People's Courts or an arbitration body and will not receive input tax credit for VAT on the acquired immovable property.

Further, the contracts, documents on conveyance and bookkeeping documents in connection with the debt settlements are exempt from stamp duty and deed tax for the financial institutions and financial asset management companies. For other parties, the contracts and documents on conveyance remain taxable.

Local governments may also reduce or exempt house property tax and urban land use tax by considering local circumstances.

The above tax treatment as extended is laid down in Announcement of the Ministry of Finance and the State Taxation Administration [2023] No. 35 and applies from 1 August 2023 to 31 December 2027. For the purposes of this Announcement, debt settlements of immovable properties and assets must be decided by People's Courts or arbitration bodies. Debt settlements carried out by a financial management company is restricted to offsetting bad debts taken from financial institutions in the banking business.

Land Appreciation Tax Exemption Extended for Restructurings

In Announcement of the Ministry of Finance and State Taxation Administration [2023] No. 51, the government has extended the exemption for land appreciation tax on transfers of land-use rights and immovable property under a change in legal form or business restructuring until 31 December 2027.

Enterprises that have undergone a change in legal form or restructuring as a whole, for example, conversion of an unincorporated business into a limited liability company or vice versa, or mergers and divisions in accordance with the relevant provisions of the Company Law, will continue to be exempt from land appreciation tax if the original investor, who inherits the rights and liabilities of the properties, remains unchanged. The exemption was set to expire on 31 December 2023.

JURISDICTION:

Hong Kong

Concessionary Tax Regime for Patent Box Proposed

Further to the 2023-24 Budget announced in February 2023, a patent box tax incentive will be introduced to provide tax concessions for profits sourced in Hong Kong and derived from eligible intellectual property (IP) assets generated through research and development (R&D) activities. On 1 September 2023, the Commerce and Economic Development Bureau published its much-anticipated consultation paper on the proposed patent box regime consistent with Hong Kong's ambition of becoming an innovation and technology centre and a regional IP trading centre.

The proposed patent box regime closely follows the nexus approach promulgated by the Organisation for Economic Co-operation and Development, which stipulates that a preferential regime should only apply to a proportion of income based on a 'nexus ratio' calculated by reference to qualifying R&D expenditures as a proportion of overall expenditures incurred to develop the IP asset. The nexus approach is not a new concept and has already been in use for determining the extent to which a foreign-sourced IP income will not be chargeable to profits tax under the refined foreign-sourced income exemption regime.

It would apply to patents, copyrighted software and plant variety rights. Eligible income will include royalties, licence fees, gains from the sale of the rights and income from a sale of the product or service with an eligible IP asset embedded in them.

For purposes of the nexus ratio, only R&D expenditures incurred in respect of eligible IP will be taken into account. This would include R&D incurred in or outside Hong Kong by the Hong Kong entity and R&D fees paid to outsourced third parties in or outside Hong Kong or outsourced to related parties in Hong Kong. As a transitional measure, the ratio must be determined based on a three year average rolling.

The concessionary profits tax rate is yet to be determined but is expected to sit anywhere between 4.5% and 8.25%. The patent box is expected to be enacted in the first half of 2024.

International Tax Developments

Bangladesh. Hong Kong signed a double tax treaty with Bangladesh on 30 August 2023. The treaty reduces the Bangladeshi withholding tax on dividends to either 10 or 15% (the lower rate applying to significant interests) whilst the interest withholding tax rate is reduced to 10%. A 10% withholding tax rate applies also to royalties and technical/management service fees. The treaty will take effect after it has been ratified by both jurisdictions.

JURISDICTION:

India

Sales Commissions are not Technical Services

The Delhi High Court (HC), in the case of *Commissioner of Income Tax v. Springer Nature Customer Services Centre GMBH (ITA. No. 306/2023)*, ruled on 12 July 2023 that commissions received for the sale, promotion and distribution of books cannot be considered fees for technical services (FTS). It also ruled that subscription fees for e-journals are not in the nature of royalties. Accordingly, no withholding tax due.

The taxpayer, a German company engaged in the publication of books and journals, executed a Commissionaire Agreement (the Agreement) with an Indian group company (SIPL) for the promotion, sale and distribution of books and journals published by SIPL in print and electronic format, as well as rendering support services for a commission of 9.9% on sales. The taxpayer also received a subscription fee from its affiliates for e-journals. The lower tax authorities sought to tax the commission as FTS as provided under section 9(1)(vii) of the Income Tax Act, 1961 and article 12 of the Germany-India Income and Capital Tax Treaty (1995), and subscription fees as royalties under section 9(1)(vi) of the Act. The income tax appellate tribunal, however, held that the payments were not in the nature of FTS/royalties and deleted the additions made by the lower tax authorities.

The Delhi High Court ruled in favour of the taxpayer because:

- There were no special skills or knowledge that the taxpayer's personnel were required to possess to render the services that were contemplated under the Agreement. The taxpayer also did not render any professional advice or service concerning a specialized field.
- Subscription amounts cannot be treated as royalties considering that there was nothing on record to suggest that the taxpayer granted the right in respect of copyright to the concerned subscribers of the e-journals. All that the taxpayer did was to sell the copyrighted publication to the concerned entities without conferring any copyright in the said material. For this purpose, the HC relied on the judgment rendered by the Indian Supreme Court in the case of Engineering Analysis.

Purchase of Shares from Shareholders is Subject to Dividend Distribution Tax

The Chennai Income Tax Appellate Tribunal, in the case of *Cognizant Technology Solutions India Pvt. Ltd. vs. Assistant Commissioner of Income Tax (ITA No.269/Chny/2022)*, has upheld the order of the lower tax authority and held that the purchase of own shares by the taxpayer was not a 'buy-back of shares' but was actually a distribution of accumulated profits and reduction of capital to be considered dividend under section 2(22) of the Income Tax Act, 1961.

Beneficial 5% Withholding Tax Rate on Qualifying Borrowings to Expire

The beneficial interest withholding tax rate of 5% has expired on 1 July 2023, except for interest paid on existing ECB compliant bonds issued prior to 1 July 2023.

Under the ECB (External Commercial Borrowing) regime, a beneficial withholding tax rate of 5% was introduced in 2012 for forex borrowings by Indian companies, REITs and InvITs under a loan agreement entered into prior to 1 July 2023 or by way of issue of any long-term bonds (including long term infrastructure bonds) prior to 1 July 2023.

Under the FPI (Foreign Portfolio Investors) regime, a withholding tax rate of 5% applied for interest income received by FPINs on rupee denominated bonds (essentially NonConvertible Debentures ("NCDs") issued by Indian companies ("FPI-NCDs") and Government securities.

The beneficial tax rate under each regime was available subject to satisfaction of prescribed conditions, the key one being a cap on the interest coupon (set by the Indian government). The Indian government has not extended the expiration date of the two regimes and hence the beneficial tax regime is no longer available with respect to interest income on ECBs issued on or after 1 July 2023 as well as for interest income on FPI-NCDs and these shall be taxable at the general tax rates applicable under domestic law.

For loans made under the ECB regime, the 5% tax rate shall continue to apply for all borrowings made under loan agreements entered into or long-terms bonds issued prior to 1 July 2023; and hence interest on borrowings or drawdowns prior to 1 July 2023 shall be grandfathered and the 5% tax rate shall continue to apply even if such interest payments are made after 1 July 2023. However, as far as FPI-NCDs are concerned, any interest payments on or after 1 July 2023 shall no longer qualify for the 5% tax rate even if the NCD has been issued prior to 1 July 2023.

The tax cost under Indian domestic law shall now be significantly higher i.e., 20% for foreign currency ECBs and FPI-NCDs (provided such NCDs qualify as a "security" as defined under Indian securities law) unless the rate is reduced under a favourable double tax treaty and the pertinent conditions for enjoying the reduced withholding tax rate under the tax treaty are met. The India-USA, India-UK and India-Singapore tax treaties cap the withholding tax rate on interest at 15%; whereas a slightly lower tax rate is available under the India-UAE tax treaty (12.5%). India's tax treaties with several EU jurisdictions cap the withholding tax rate at 10% (such as Luxembourg, Ireland, the Netherlands) and the India-Mauritius treaty provides for a further reduced tax rate of 7.5%.

Alternatively, the Indian Stock Exchange ("INX") has been established in the IFSC Gift City and has been positioned as an alternative to the Singapore Stock Exchange and the London Stock Exchange. While the tax relief offered to offshore bonds listed on the Singapore Stock Exchange and the London Stock Exchange has been withdrawn from 1 July 2023, a concessional tax rate of (presently) 9% applies in respect of interest paid on long-term forex bonds or rupee denominated bonds which are listed only on a stock exchange located in the IFSC Gift City, i.e., the INX.

Most Appropriate Method Advance Pricing Agreement

In the case of *Principal Commissioner of Income Tax v. Springer India Pvt. Ltd.* (ITA. No. 451/2022), the Delhi High Court (HC) has upheld the lower court's decision in applying the most appropriate method (MAM) (applicable for determination of the arm's length price of a transaction between associated enterprises under transfer pricing) for the current tax year on the basis of the advance pricing agreement (APA) executed with the Revenue for subsequent years.

The taxpayer, an Indian company, concluded an APA with the Central Board of Direct Taxes (CBDT) on 6 August 2019. The APA covered the period from the tax years 2013-14 to 2021-22. Of the 18 transactions covered by the APA, it was agreed that 16 transactions would be benchmarked by using the "other method" while the remaining two transactions would be benchmarked by using the transaction net margin Method (TNMM) and the resale price method (RPM). The lower court ruled that the APA should form the basis for benchmarking for tax year 2012-13, despite the fact that the APA was effective only in the tax year 2013-14. The Revenue appealed against this order of the lower court.

The HC considered the issue whether the lower court had correctly applied the APA to the tax year 2012-13, although it was effective from the tax year 2013-14. The HC ruled in favour of the taxpayer and observed that:

- the APA provision was inserted in the statute with effect from the tax year 2013-14;
- the approach adopted by the lower court is wholesome and a perusal of the lower court's order shows that it was conscious of the fact that the assessee could enter into the APA with CBDT only from the tax year 2013-14;
- having regard to this limiting factor and given the complexity of the transaction which the taxpayer is involved in, the lower court thought it fit that the APA could be used to benchmark the transactions even for the relevant tax year; and
- the direction to use the APA is ring-fenced with the caveat that the transfer pricing officer will have to determine as to whether the functions, assets and risks (FAR) in the given tax year are the same as those which are covered in the APA.

Offshore Activity not Attributable to PE in India

The Delhi Income Tax Appellate Tribunal (ITAT), in the case of *Hitachi Ltd. v. ACIT (ITA. Nos 2259/2022 and 2260/2022)*, held that income from the taxpayer's offshore activities was not attributable to a permanent establishment (PE) in India as the activities were undertaken outside India and the taxpayer incurred a loss at a global level.

The taxpayer was a Japanese multinational engineering and electronics conglomerate company. During the relevant tax years, the taxpayer rendered the following services to an Indian railway company through various project offices in India: (i) offshore procurement and supply of goods; and (ii) onshore procurement and supply of goods and services in India. The taxpayer offered net income from onshore activities as income in India. However, the tax authorities attributed 35% of income from offshore activities and the taxpayer's global profit rate of 6.87% to the PE in India.

Safe Harbour Valuation Rules for Investment in Indian Companies

The Central Board Of Direct Taxes (CBDT) has issued a notification amending the valuation rules (rule 11UA of the Income Tax Rules, 1962) for investment in equity shares of a closely held company for the purpose of section 56(2)(viib) of the Income Tax Act, 1961 (the Act). This section provides that if the consideration for the issue of shares in a closely held company exceeds the fair market value (FMV) of the shares, the excess will be taxable (also known as "angel tax").

Specifically, the notification provides that where an investment is made by an Indian tax resident, unquoted equity shares may be valued as per the different methods provided below, at the option of the taxpayer:

- net asset value (NAV) method;
- discounted cash flow (DCF) method;
- FMV of the equity shares to the extent it does not exceed the aggregate investment received, in the case of investments made by a venture capital fund (VCF) or a venture capital company (VCC) or a specified fund in unquoted equity shares of the venture capital undertaking (VCU), provided the consideration is received within 90 days before or after the date of issue of shares; and
- FMV of the equity shares to the extent it does not exceed the aggregate investment received, in the case of investments made by an entity notified by the CBDT, provided the consideration is received within 90 days before or after the date of issue of shares.

Further, the notification provides that where an investment is made by a non-resident taxpayer, unquoted equity shares may be valued as per the different methods provided below, at the option of the taxpayer:

- all methods applicable to a resident taxpayer; and
- FMV determined by a merchant banker under any of the following methods: (i) comparable company multiple method; (ii) probability weighted expected return method; (iii) option pricing method; (iv) milestone analysis method; (v) replacement cost methods.

Compulsorily convertible preference shares (CCPS) issued by a company may be valued as per any of the abovementioned methods other than the NAV method.

For the purpose of valuation, the taxpayer may consider the valuation date as per the valuation report of the merchant banker provided it is dated not more than 90 days prior to the date of issue of shares.

Finally, the notification provides for safe harbour rules whereby the issue price of shares will be considered as FMV if the consideration received does not exceed 10% of the value of shares arrived as per:

- NAV, DCF methods for a resident taxpayer; and
- NAV, DCF, merchant banker valuation methods for a non-resident taxpayer.

Arm's Length Reward so no Profit Attribution for Agency PE

Consistent with a supreme court ruling in the Morgan Stanley case, the Mumbai Income Tax Appellate Tribunal (ITAT), in the case of *M/s. Fedex Express International B.V. vs. ACIT (ITA No.2463/ Mum/2022 and 2464/Mum/2022)*, held that the transactions between the taxpayer and its Indian associated enterprises (AEs) were at arm's length. Accordingly, no further profits must be attributed to the taxpayer having a dependent agent permanent establishment (DAPE) in India through such AEs.

Non-resident Capital Gains Tax Exemption for Units of Specific Investment Trust, Scheme, and Fund on IFSC Exchange

The Central Board of Direct Taxes (CBDT) has issued notification 71/2023 dated 12 September 2023 extending the scope of capital gains tax exemption to non-residents on specific capital assets transferred on a recognized stock exchange located in any International Financial Services Centre (IFSC), provided the consideration for such a transaction is paid or payable in foreign currency. The notification takes effect immediately.

More specifically, the exemption is extended to the following capital assets:

- unit of an investment trust;
- unit of a scheme; and
- unit of an Exchange Traded Fund launched under International Financial Services Centres Authority (Fund Management) Regulations, 2022 (Regulations).

For this purpose, the terms "investment trust" and "scheme" are defined under the Regulations.

Currently, this exemption is applicable to capital assets being specified bonds or global depository receipt, rupee denominated bonds of an Indian company, or derivatives transferred by a non-resident on a recognized stock exchange located in any IFSC, provided the consideration for such a transaction is paid or payable in foreign currency.

JURISDICTION:

Indonesia

Depreciation and Amortization

The Minister of Finance (MoF) has recently issued further guidance regarding the depreciation of tangible assets and amortization of intangible assets. Regulation No. 72 of 2023 (PMK-72) was issued following the issuance of Government Regulation No. 55 of 2022 to provide legal certainty in accordance with Law No. 7 of 2021 on the Harmonization of Tax Regulations and simplify laws and regulations related to depreciation and amortization that had previously been spread across several regulations. The issuance of PMK-72 revokes MoF Regulations No. 96/PMK.03/2009, No. 248/PMK.03/2008, and No. 249/PMK03/2008 as amended by MoF Regulation No. 126/PMK.011/2012.

- A taxpayer now has the option of depreciating a permanent building according to the actual useful life based on a taxpayer's books. For permanent buildings that are owned and used prior to tax year 2022 and have been depreciated based on a useful life of 20 years, a taxpayer may opt to depreciate according to the useful life based on the taxpayer's books by submitting a notification to the Directorate General of Taxation (DGT) no later than 30 April 2024.
- The repair costs for tangible assets that have a useful life of more than 1 year are capitalized at the fiscal net book value of the assets and are expensed through depreciation.
- For insurance reimbursements, if there is a transfer or withdrawal of assets that are subject to insurance compensation, the total fiscal net book value of the assets transferred or withdrawn is charged as a loss and the total selling price or insurance replacement is recorded or recognized as income in the year the withdrawal occurs. However, a taxpayer may postpone the recognition of the loss by submitting an application for approval to the DGT.
- If an intangible asset has a useful life of more than 20 years, the taxpayer has the option to amortize such asset according to its actual useful life based on the taxpayer's books. For intangible assets that are owned and used prior to tax year 2022 and have been depreciated based on a useful life of 20 years, the taxpayer may opt to amortize such assets according to the useful life based on the taxpayer's books by submitting a notification to the DGT no later than 30 April 2024.
- Livestock that reproduce after being reared for up to 1 year are depreciated for up to 4 years.
- Tangible assets in certain business fields are generally depreciated starting from the month of commercial production, which is the month in which sales are started, with the exception of livestock groups that reproduce after being reared for up to 1 year, which are depreciated starting in the year the expenditure is made.

Benefits in Kind

The Ministry of Finance (MoF) has provided further guidance on the tax treatment of certain benefits-in-kind (BIKs) in Regulation No. 66 of 2023 (PMK-66) of 27 June 2023, which includes a definition of coupons given to employees that can be exchanged for food and beverage for the purposes of non-taxable BIKs, determination of a remote area based on infrastructure indicators, and details and limitations of certain BIKs.

As reported in the previous edition of this bulletin, PMK-66 took effect from 1 July 2023 and replaced MoF Regulation No. 167/PMK.03/2018 of 19 December 2018. PMK-66 was issued as a follow-up to Government Regulation No. 55 of 2022 of 20 December which provides further guidance on BIKs pursuant to Law No. 7 of 2021 on the Harmonization of Tax Regulations (*Harmonisasi Peraturan Perpajakan*, HPP Law).

- Reimbursement costs or BIKs in respect of work or services may be deducted by employers/providers of BIKs or reimbursements from gross income to determine their taxable income, as long as they are expenses for obtaining, collecting and maintaining income, and are taxable income in the hands of employees/recipients.
- BIKs received by employees in 2022 are not taxable. BIKs received during the period January 2023 to June 2023 are taxable to the employees; where tax has not been withheld by the employer, the tax must be calculated, paid and reported by the employee in their annual income tax return for 2023.

Non-taxable BIKs include the following:

- Food or drink provided for all employees at work. However, meal coupons provided to employees for services outside the workplace (including in the form of reimbursements for food or drink expenses) are limited to a maximum of IDR 2 million per month or the actual amount of expenses for food or drink provided by the employer at the workplace (whichever is higher); and
- BIKs of certain categories and limitations, if any:
  - » BIKs related to occupational safety, health and safety standards including uniforms, employee shuttle, work safety equipment, medicines/vaccines in handling a pandemic which are required by a ministry or agency based on statutory provisions;
  - » facilities and infrastructure for employees and their families working in the area, including remote areas, including facilities, infrastructure, and housing facilities, health, education, transportation and sports services;
  - » gifts for religious holidays for all employees do not have value restrictions, while gifts other than for religious holidays are limited to a maximum of IDR 3 million per year;
  - » work equipment and facilities from employers such as laptops, computers, cell phones, and Internet;
  - » health and medical service facilities in handling work accidents, occupational diseases, emergencies, and their follow-up treatment;
  - » sports facilities other than golf, horse racing, power boating, gliding, and automotive are limited to a maximum of IDR 1.5 million per year;
  - » communal living facilities such as dormitories. However, residential facilities provided by an employer including apartments and houses are limited to a maximum of IDR 2 million per month;
  - » vehicle facilities from the employer, provided that the employee/beneficiary is not a shareholder in the employer and the employee's average gross income for the last 12

months is not more than IDR 100 million per month;

- contributions to pension funds borne by employers for employees; and
- religious facilities, including prayer rooms, mosques, chapels or temples intended solely for religious activities.

Pillar 2 - Global Minimum Tax

Courtesy of IBFD it was reported that Japan's Ministry of Finance has issued regulations to amend its corporate income tax rules to implement the main part of the OECD's global minimum tax proposal, i.e. the income inclusion rule (IIR). Japan's IIR will allow it to impose additional taxes on Japanese parent entities with subsidiaries in low-tax jurisdictions where the effective tax rate is below 15%. The amended rules can be found here (in Japanese).

The ministerial regulations, which were issued on 30 June 2023, follow the 2023 tax reform laws approved by the Diet on 28 March 2023 and the governmental regulations issued by the Cabinet on 16 June 2023, and provide the substantive details of Japan's IIR. These laws and regulations take into account OECD publications, specifically the Model Rules of December 2021, the Commentary of March 2022, the Safe Harbour and Penalty Relief Guidance of December 2022, and the Administrative Guidance of February 2023. However, Japanese laws and regulations do not yet reflect the additional Administrative Guidance of July 2023 and the guidance on information returns that were released by the OECD after Japan had finalized its laws and regulations.

While the OECD proposal includes the under-taxed payments rule (UTPR) and qualified domestic minimum top up tax (QDMTT), Japan has not yet started to codify these two components. The QDMTT will prevent the effective tax rate in Japan from falling below 15%, while the UTPR would allow Japan to impose additional taxes on Japanese entities of multinational enterprise groups that are under-taxed even after considering the IIR taxes and QDMTTs imposed by other countries. The Japanese ruling coalition announced in December 2022 that the UTPR and QDMTT would be addressed in tax reform proposals in 2024 or later.

At an online seminar organized by the Japan Tax Association, a Deputy Director of the International Tax Policy Division from the Ministry of Finance presented a technical explanation of the Japanese global minimum tax laws

and regulations established over the first half of 2023.

The central part of the presentation was referential information, showing which Japanese provisions correspond to which parts of the OECD rules, but also contained new interpretive insights. Specifically, the technical explanation acknowledges that the definition of "ownership interest" in Japanese legislation is not always identical to that in the OECD model rules. The model states that "Ownership Interest means any equity interest that carries rights to the profits, capital or reserves of an Entity." However, in defining the components of equity interests, Japanese law traditionally employs a dichotomy between rights regarding the *Rieki-no-Haitou* (non-liquidating distribution) and the *Zanyozaisan-no-Bunpai* (distribution of residual assets upon liquidation) rather than the trichotomy by payment source ("rights to profits, capital or reserves"). The presentation noted that the Japanese global minimum tax law also employs the traditional dichotomy rather than the trichotomy suggested by the model in defining "Ownership Interest".

The presentation also included a table showing covered taxes in Japan. The table highlights that the per capita levy of corporate inhabitant tax and the pro forma levy of enterprise tax will not be treated as covered taxes.

The seminar was held on 25 July 2023 and followed the release of the detailed ministerial regulations on the implementation of the global minimum tax.

Interpretive Guidance on Pillar 2

On 29 September 2023, the Japanese National Tax Agency (NTA) has notified its interpretive position following the parliamentary and government enactment of the global minimum tax laws and regulations in the first half of this year. Although the NTA's notice itself is not a legally binding norm, in-scope multinational enterprises may rely on it, since the NTA will not take a different interpretive position from it until further notice.

As the tax authority in Japan, the NTA has publicly notified its interpretive position on various Japanese tax laws. Likewise, the NTA updated the notice as of 21 September 2023 to add about 90 interpretive positions related to the newly enacted Japanese income inclusion rule (IIR), the main part of the OECD's global minimum tax proposal.

Most interpretive positions are taken from OECD publications, while some provide more specific views by referring to current Japanese tax law provisions. For example, Notice No.18-1-66 lists Japanese taxes imposed on corporations but excluded from the covered taxes; and Notice No.18-1-76 provides an illustrative formula for allocating corporate income tax borne by a domestic parent company under the Japanese controlled foreign company legislation to its foreign subsidiaries.

Along with the updated notice, the NTA issued a statement summarizing the updates and, more importantly, justifying these interpretive positions by claiming that the Model Rules and other relevant documents have been fully considered. The statement also points out that the Japanese global minimum tax laws and regulations should not be interpreted in a manner inconsistent with the Model Rules and related documents.

'Innovation Box' as R&D Incentive

Japan has released a discussion paper on a new R&D incentive referred to as the "Innovation Box" that would apply a preferential tax rate on income from intellectual property (IP).

This discussion paper was released by a study group within the framework of the Ministry of Economy, Trade and Industry of Japan (METI). It focuses on the innovation box as a way to stimulate domestic R&D investment, mitigate the offshore transfer of R&D and maintain the competitiveness of the Japanese tax regime. It emphasizes that the Innovation Box will extend the tax benefit to income from IP assets as the output of R&D on top of the existing R&D tax credits applicable to expenditures as the input of R&D.

It also discusses the possible design of the Japanese Innovation Box, considering the "nexus approach" recommended by the final report of the OECD's BEPS Action 5 (Addressing Harmful Tax Practices). While the "nexus approach" requires countries to provide incentives only to taxpayers that have tracked the link between their expenditures and income of relevant IP assets, this paper explores the possibility of a so-called "indirect tracking" option with a simplified formula instead of actual direct tracking to make the incentive more accessible.

This discussion paper is only a proposal and not an official decision to implement the innovation box. Under the Japanese tax legislative practice, whether proposals will become part of a future tax reform bill will be decided by inter-ministerial discussions between METI and the Ministry of Finance in the summer and internal talks within the ruling party in the late autumn.

VAT Treatment of digital Platforms

On 31 August 2023, the Ministry of Economy, Trade and Industry (METI) has proposed a VAT reform that would make online platform operators liable for VAT on behalf of foreign service providers that render their services through the online platform. The proposal will be part of the 2024 tax reform package if approved by relevant processes such as inter-ministerial discussions with the Ministry of Finance and internal negotiations within the ruling party.

The METI noted that this proposal would improve Japanese service providers' competitiveness against their foreign peers. In particular, the ministry focused on the fact that the digitalization and globalization of the economy enable foreign businesses to access Japanese consumers via online platforms without having any presence in Japan. Under the current Japanese VAT legislation, the foreign service providers, not the platform operators, are liable for VAT as long as the platform is an intermediary. This has become a serious tax administration challenge because it is impractical to identify, investigate and collect taxes from foreign businesses without any presence in Japan. Accordingly, the METI argued that it must be a top priority to enforce VAT on foreign service providers by collecting it from platform operators to level the playing field between domestic and foreign businesses. Additionally, the METI noted that other countries have already introduced specific VAT regimes addressing online platforms and imposed VAT reporting obligations and tax liability on online platform operators.

International Tax Developments

Russia. On 8 August 2023, Russia signed Decree No. 585, temporarily suspending specific provisions of 38 of its double tax treaties including its treaty with Japan. Japan lodged an official protest in response to this action. While the tax treaties themselves will continue to hold validity, the suspension primarily impacts reduced tax rates on dividends, interest, and royalties applicable to businesses. As of now, there are no intentions to terminate these treaties. In as far as Asian countries is concerned, the suspension includes Russia's tax treaties with Japan, Korea and Singapore, respectively.

JURISDICTION:

Korea

2023 Tax Law Amendment Proposals

Courtesy of IBFD, the Korean Ministry of Economy and Finance has announced the 2023 tax law amendment proposals that include deferring the Undertaxed Payment Rule (UTPR) implementation to 1 January 2025, expanding the scope of technologies eligible for research and development (R&D) tax credits, extending the concessional flat tax rate for foreign employees, strengthening some anti-avoidance provisions and several other changes in relation to international taxation. The proposals were announced on 27 July 2023 and are subject to approval by the National Assembly. The following are the highlights.

DEFERRING IMPLEMENTATION OF UTPR

The Korean global minimum tax rules were supposed to take effect for fiscal years beginning on or after 1 January 2024, but the implementation of the UTPR will be deferred by 1 year to 1 January 2025. This brings Korea in line with other jurisdictions that have announced the implementation of the UTPR for fiscal years beginning on or after 1 January 2025 (e.g. the European Union, United Kingdom, Japan, Canada, Singapore, Hong Kong, Australia and New Zealand). The Income Inclusion Rule will be effective for fiscal years beginning on or after 1 January 2024, as originally planned.

The terms used in the global minimum tax rules such as the ultimate parent entity, permanent establishment, group, etc. will also be clarified to ensure that the scope of application of these rules is in line with the Pillar 2 Model Rules and Commentary, as well as OECD/IF administrative guidance. Further, the proposed amendment makes it clear that, in accordance with the administrative guidance, the EUR 750 million threshold will need to be rebased with reference to the average foreign exchange rate for the December month immediately prior to the commencement of the relevant calendar year.

The rules for calculating global anti-base erosion (GloBE) income or loss will also be clarified, as well as the requirements for a qualified domestic minimum top-up tax. Additionally, changes will be made to the rules for allocating UTPR top-up tax among constituent entities (the rules for allocating UTPR top-up tax to UTPR jurisdictions remain the same), and penalty relief for non-compliance will be allowed during the transition period.

EXPANDING SCOPE OF TECHNOLOGIES ELIGIBLE FOR R&D TAX CREDITS

On 22 March 2023, the Finance Committee of the Korean National Assembly passed a bill known as the "K-Chips Act" to increase the tax credits available for eligible facility investments in qualified technologies and to expand the scope of national strategic technologies.

It is proposed that the biopharmaceutical sector will be added to the list of national strategic technologies and their scope expanded to a total of 62 technologies and 50 facilities in 7 sectors, and will apply to R&D expenses incurred, or facility investments made, on or after 1 July 2023.

Supply chain-related essential technologies, including core technologies for energy efficiency improvement, refining/smelting technologies for critical minerals, etc., will be added to the list of new growth/original technologies, effective for R&D expenses incurred on or after 1 January 2024.

EXTENDING APPLICATION TIMELINE FOR CONCESSIONAL FLAT TAX RATE AVAILABLE TO FOREIGN EMPLOYEES

Currently, foreign employees who start to work in Korea on or before 31 December 2023 can elect to be taxed at a flat income tax rate of 19% for 20 years, starting from their first day of work in Korea. The application timeline will be extended such that foreign employees who start to work in Korea on or before 31 December 2028 can apply the 20-year concessional flat tax rate.

Foreign employees who apply the concessional flat tax rate are currently not allowed to claim any income deductions or tax deductions/exemptions/credits. To stabilize foreign investment and employment of foreign workers in Korea, it is proposed that employer-provided housing benefits will be permanently excluded from the employment income of such foreign employees (the exclusion is set to expire on 31 December 2023).

REPORTING REQUIREMENT FOR FOREIGN STOCK-BASED COMPENSATION PROVIDED TO EMPLOYEES

Where the employees of a Korean company or a Korean PE of a foreign company receive stock-based compensation directly from overseas, such as stock options for the foreign parent's listed shares, the gain recognized from exercising the foreign stock-based compensation is (i) treated as Korean-sourced employment income and subject to personal income tax in Korea; but (ii) not subject to tax withholding in Korea as it is treated as employment income paid outside of Korea (formerly known as "Class B employment income"). Because Korean companies/PEs are not withholding agents in such a case and are not required under the law to provide any information to the tax authority, requests by the tax authority for information relating to foreign stock-based compensation (e.g. details on the exercise/payment of foreign stock-based compensation) are often rejected by the Korean companies/PEs, also out of concern about a potential violation of the Personal Information Protection Act.

To strengthen the rules against tax avoidance, it is proposed that Korean companies/PEs will be required to submit detailed transaction information if their employees (including former employees) receive stock-based compensation from a foreign company that is the controlling shareholder of the relevant Korean company/PE. Stock-based compensation refers to stock options, or bonuses provided in shares or money equivalent to the value of shares, and the submission of transaction information includes details on the grant/exercise/payment of the stock-based compensation, gain recognized from the exercise/payment, and personal information of the relevant employee. The information is due by March 10 of the year following the year in which the stock-based compensation is exercised or received. The proposed amendment will apply to stock-based compensation exercised or paid on or after 1 January 2024, in which case relevant information will have to be submitted by 10 March 2025.

SHORTENING DEADLINE FOR SUBMISSION OF LOCAL FILES AND MASTER FILES

Currently, a Korean company or a Korean PE of a foreign company that meets certain thresholds (e.g. sales revenue) must submit a local file, master file and country-by-country (CbC) report to the relevant tax office within 12 months from the end of a fiscal

year. It is proposed that the deadline for submission of master files and local files (but not CbC reports) be shortened to 6 months from the end of a fiscal year.

Currently, for taxpayers engaging in cross-border transactions with a foreign related party, the obligation to submit international transaction statements (i.e. a statement of international transactions, summary profit and loss statement, and arm's length price calculation report) within 6 months from the end of a fiscal year is exempted (since 1 January 2020) where the taxpayer is required to submit a local file and the international transaction statements are submitted as part of the appendix to the local file. It is proposed that, even if a taxpayer has an obligation to submit a local file and master file, the taxpayer must submit international transaction statements separately within 6 months from the end of a fiscal year.

The proposed amendment is effective for fiscal years beginning on or after 1 January 2024.

IMPOSING PENALTIES ON FOREIGN ELECTRONIC SERVICE SUPPLIERS FOR FAILURE TO REGISTER FOR VAT

Currently, a foreign business (a foreign corporation or a non-resident individual) that directly or indirectly provides electronic services to consumers in Korea is required to complete a "simplified business registration" within 20 days from the commencement of its business in Korea and to report and pay VAT in Korea. To improve enforcement of this requirement, it is proposed that in the event of non-compliance, the relevant tax office can (i) conduct an investigation and register the foreign electronic service supplier (through the simplified business registration process) at its discretion; and (ii) impose a penalty equivalent to 1% of the total value of supply during the unregistered period. The proposed amendment applies to supplies made on or after 1 January 2024.

SPECIAL TAXATION FOR OMNIBUS ACCOUNTS USED BY FOREIGN INVESTORS

An "omnibus account" is a single account established (with a Korean securities company) and managed by a global securities company or asset management company for the purpose of consolidating trading orders and settlements from multiple clients. The account is held under the name of the global securities company or asset management company.

For omnibus accounts used by foreign investors, it is proposed that the income payor can withhold tax with reference to the holder of the omnibus account (as opposed to the beneficial owner of the income), and the income payor cannot apply a treaty exemption or treaty rate at the time of tax withholding. However, if the beneficial owner or income payor wishes to apply an exemption or reduced rate under an applicable tax treaty, the beneficial owner or income payor can submit a tax refund request to the tax office having jurisdiction over the income payor within 5 years from the last day of the month in which tax is withheld.

The proposed amendment applies to income paid on or after 1 January 2024. The Korean financial authority is looking to abolish the current foreign investor registration system (which was viewed as inconvenient and not in line with international standards) and the requirement to report the details of investments made via an omnibus account immediately upon payment (T+2). The proposed amendment reduces the burden on securities companies operating omnibus accounts and also provides an opportunity for foreign investors to reduce their tax burden, by allowing the income payor to first withhold tax without having to assess the potential tax treaty application for each beneficial owner and to subsequently submit a tax refund request.

FORMATION OF A CONSULTATIVE COMMITTEE FOR TAX TREATY IMPLEMENTATION

To effectively implement and manage the implementation of tax treaties (including the mutual agreement procedure), and to strengthen international tax cooperation, it is proposed that the Ministry of Economy and Finance will be empowered to form a consultative committee for tax treaty implementation. The committee will be operated with the other contracting state of a tax treaty in order to discuss and reach an agreement with respect to: (i) matters necessary for discussion regarding the application and interpretation of the relevant tax treaty; (ii) notification of important changes in the tax laws of both contracting states; and (iii) other matters relating to the implementation of the relevant tax treaty and cooperation in the area of international tax.

International Tax Developments

Russia. On 8 August 2023, Russia signed Decree No. 585, temporarily suspending specific provisions of 38 of its double tax treaties including its treaty with Korea. While the tax treaties themselves will continue to hold validity, the suspension primarily impacts reduced tax rates on dividends, interest, and royalties applicable to businesses. As of now, there are no intentions to terminate these treaties. In as far as Asian countries is concerned, the suspension includes Russia's tax treaties with Japan, Korea and Singapore, respectively.

JURISDICTION:

Malaysia

Labuan Offshore Companies

Courtesy of "Skrine & Co" it was reported that in *Bright World Trading Co Ltd & Ors v Director General of Inland Revenue & Anor and Other Cases* [2023] 6 CLJ 538, the High Court handed down three rulings in relation to the following subsidiary legislation made under the Labuan Business Activity Tax Act 1990 ("**LBATA**"):

1. Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 [P.U.(A) 392/2018] ("the **2018 Regulations**");
2. Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 [P.U.(A) 375/2020] ("the **2020 Regulations**"); and
3. Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 [P.U.(A) 423/2021] ("the **2021 Regulations**").

The 2018 Regulations (which were amended by the 2020 Regulations) and the 2021 Regulations set out the requirements ("**substance requirements**") that have to be satisfied by a Labuan entity in order for its business to be taxed at the rate of 3% of its chargeable profits under section 4 of the LBATA instead of the rate of 24% under section 2B(1A) of the LBATA. The 2021 Regulations which revoke the 2018 Regulations were gazetted on 19 November 2021, purportedly to take effect retrospectively from 1 January 2019.

The High Court held that:

1. the 2018 Regulations are ultra vires and invalid;
2. the 2020 Regulations are invalid; and
3. the 2021 Regulations are to take effect prospectively from the date they were made, namely 19 November 20212 and not retrospectively from 1 January 2019 as provided in the 2021 Regulations.

The High Court's reason for striking down the 2018 Regulations was that the 2018 Regulations were made by the Deputy Prime Minister and not by the Minister of Finance. According to the High Court, "[i]t seems that there is no order of notification in the Gazette by the Yang di-Pertuan Agong conferring or designating the Deputy Prime Minister with the functions and responsibility for the country's finance during the time when the 2018 Regulations were enacted by the Deputy Prime Minister."

Second, as there are no provisions in the LBATA that allow the Minister of Finance to sub-delegate the powers conferred on him to make subsidiary legislation, the purported exercise by the Deputy Prime Minister of the powers to make the 2018 Regulations contravenes the maxim *delegatus non potest delegare* and the 2018 Regulations are therefore ultra vires and invalid.

Although the 2020 Regulations were made by the Minister of Finance, the said regulations are likewise invalid and ineffective as they purport to amend the 2018 Regulations which are invalid.

The 2021 Regulations

According to the learned Judge:

1. the applicants in this case have the vested rights as Labuan entities with business activities not required to satisfy the substance requirements and are entitled to the benefit of being subjected to tax at a lower rate under the LBATA before the making of the 2021 Regulations;
2. it is impossible for the applicants now to go back in time to 2019 to fulfil the substance requirements as prescribed by the 2021 Regulations in order to avoid being subject to a higher tax rate;
3. to require the applicants to go back in time to comply with the substance requirements retrospectively would be a grave injustice to them. The legislature could not have intended to confer such authority or power upon the Minister of Finance or delegate the authority or power to prescribe the substance requirements to apply retrospectively through the provisions of sections 2B(2) and 21 of the LBATA for the purpose of making regulations;
4. there is no express provision in the LBATA which empowers the Minister of Finance to make regulations to apply retrospectively5;
5. for the purposes of delegated legislative provisions, the authority delegated to legislate by regulations has no power to legislate by regulations that apply retrospectively so as to take away the vested rights of citizens unless authorised expressly or by necessary implication by the parent Act, that is the LBATA in this case; and
6. section 20 of the Interpretation Acts 1948 and 1967 has to be narrowly and strictly construed so as to not take away the vested rights of the applicants and subject to section 30 of the same Acts.

While the High Court's decision that the 2018 Regulations and the 2020 Regulations are invalid is significant from a legal perspective, its practical impact is limited to the years of assessment 2019 to 2021 as the 2018 Regulations (as amended by the 2020 Regulations) have been revoked by the 2021 Regulations as from 19 November 2021.

The decision that the 2021 Regulations cannot operate retrospectively to deprive Labuan entities of vested rights will be welcomed by such entities that are unable to retrospectively satisfy the substance requirements introduced under the 2021 Regulations. It would appear that Labuan entities that were subjected to a higher tax rate based on the 2018 Regulations or for the period during which the 2021 Regulations purported to have retrospective effect may seek to recover the excess tax paid to the tax authority.

E-invoices

Courtesy of IBFD, the Inland Revenue Board (IRB) has recently issued the e-Invoice Guidelines (version 2.0.) and the e-Invoice Specific Guidelines (version 1.0.) to provide further guidance to taxpayers in preparation for the imminent rollout of e-invoicing in Malaysia from 1 June 2024, for taxpayers with an annual turnover or revenue of more than MYR 100 million. The e-Invoice Guidelines (version 2.0.) contain updated general information regarding the implementation of e-Invoice and replace the first version of 21 July 2023.

e-INVOICE GUIDELINES (VERSION 2.0.)

- The IRB clarified that taxpayers who are within the annual turnover or revenue threshold as provided in the guidelines are required to

issue and submit e-invoices for IRB's validation according to the implementation timeline. Invoices issued prior to the implementation date are not required to be converted into e-invoices.

- Certain persons are exempted from issuing e-invoices such as the government and the facilities it provides, including hospitals, multipurpose halls, consular offices and diplomatic officers, consular officers and consular employees and other specified persons. However, the exemption only applies to the specified persons. Any entities (e.g. companies, limited liability partnership, etc.) owned by the above-mentioned persons would still be required to implement e-Invoice.
- E-Invoice is not required for transactions in relation to employment income, pension, alimony, distribution of dividend in specific circumstances, Zakat and scholarship.
- Once the e-invoice is validated (which is done in near real time), the IRB will issue the validated e-invoice, which will include information such as the IRB Unique Identifier Number, to the supplier. Unvalidated invoices will return an error, requiring correction and re-submission.

e-INVOICE SPECIFIC GUIDELINES (VERSION 1.0.)

- The Specific Guidelines provide further guidance on the issuance of e-invoices relating to the following areas:
  - » transactions with buyers;
  - » statements/bills on a periodic basis;
  - » disbursements and reimbursements;
  - » employment perquisites and benefits;
  - » certain expenses incurred by employee on behalf of the employer;
  - » self-billed e-invoices;
  - » transactions which involve payments in monetary form to agents, dealers or distributors;
  - » cross-border transactions;
  - » profit distributions (e.g. dividend distributions);
  - » foreign income;
  - » currency exchange rates;
  - » application programming interface (API) overview; and
  - » cybersecurity.
- The IRB clarified that an e-invoice would be required for all foreign income received in Malaysia from outside Malaysia as a proof of income for tax purposes.
- Currency exchange rates should be determined by:
  - » first, legal/tax requirements set by authorities like the Royal Malaysian Customs Department or IRB; or
  - » if no such requirements exist, suppliers can use their internal policy rate.

Stamp Duty

The stamp duty rate for shares traded on Bursa Malaysia is reduced from 0.15% to 0.10% of the contract value, subject to a maximum cap of MYR 1,000 per contract, with effect from 13 July 2023.

The Ministry of Finance gazetted Stamp Duty (Remission) (No. 3) Order 2023 (PU(A) 208/2023) on 12 July 2023 following the announcement made by the Prime Minister. Stamp Duty (Remission) Order 2022 (PU(A) 112/2022) is revoked accordingly.

The reduced stamp duty rate will apply to contract notes executed on or after 13 July 2023 but not later than 12 July 2028.

Tax Exemption for Relocation of Manufacturing Operations

The Ministry of Finance has gazetted an exemption order that grants an income tax exemption to existing companies in Malaysia from payment of income tax on statutory income derived from qualifying manufacturing activities, for the relocation of its manufacturing operations to Malaysia for a new business where the product from the new business is not an expansion project for the existing product. The exemption is equivalent to the amount of the qualifying capital expenditure (QCE) made by the qualifying company during the basis period for that year of assessment (YA).

- The exemption applies to an existing company, i.e. a company that:
  - » is locally incorporated and a tax resident of Malaysia;
  - » conducts ongoing manufacturing operations in Malaysia; and
  - » relocates its manufacturing operations to Malaysia for a new business where the product from the new business is not an expansion project for the existing product.
- The activities must not be in the list of non-qualifying activities as provided under the Schedule of PU(A) 240/2023.
- A written application needs to be submitted by a qualifying company to the Minister through the Malaysian Investment Development Authority (MIDA) between 1 July 2020 and 31 December 2024. This application must comply with the prescribed conditions.
- The conditions imposed on a qualifying company include:
  - » a minimum investment in fixed assets, excluding land, of more than MYR 300 million within 3 years from the date of the first QCE made; and
  - » employment of at least 80% full-time Malaysian employees by the end of the third year from the date of the first invoice related to the qualifying activity. This employment level should be maintained until the exemption period concludes.
- The granted exemption will last for 5 consecutive years, starting from the date of the first QCE made by the qualifying company, as determined by the MIDA. The date of the first QCE made by the qualifying company must not be before 1 July 2020.
- The QCE refers to the capital expenditure a qualifying company incurs related to a factory, machinery or plant used exclusively in Malaysia for a qualifying activity. It does not include buildings used as living accommodations or machinery/plant used by directors, management, administration, or clerical staff.
- The exemption will be revoked if there is a disposal of the factory, machinery or plant within 5 years from its acquisition date.

JURISDICTION:

Singapore

Tax on Gains

Singapore will tax gains on the sale of offshore assets as from 1 January 2024 unless the seller has sufficient economic substance in Singapore or the gain is not brought into Singapore. A public consultation about the proposed tax provision was held by the Ministry of Finance (MOF) in June 2023 and on 4 September, the MOF responded to the public feedback with the following responses. Parliament approved the new tax provision (section 10L of the Income Tax Act) on 3 October 2023.

Under s.10L, gains from the sale or disposal of foreign assets that are received in Singapore by businesses without economic substance in Singapore will be taxable from 1 January 2024.

Public feedback: To allow foreign-sourced disposal losses to be set-off against foreign-sourced disposal gains.

MOF response: Accepted. We will allow the set-off of foreign-sourced disposal losses against foreign-sourced disposal gains that are subject to tax. The set-off will be restricted to foreign-sourced disposal losses that would have otherwise been brought to tax if they were gains. In addition, unutilised foreign-sourced disposal losses may be carried forward indefinitely for set-off against foreign-sourced disposal gains in future years.

Public feedback: To allow expenses incurred to protect or preserve the value of the foreign asset to be deductible from foreign-sourced disposal gains that are taxable.

MOF response: Accepted. MOF will allow such expenses incurred to be deductible from foreign-sourced disposal gains that are taxable, provided these expenses have not been deducted against any other income.

Public feedback: To expand the definition of pure equity holding entities ("PEHE") to include investment holding entities ("IHE") that hold investments in the form of debts/bonds/notes/convertible instruments/funds. The feedback arose as the draft legislation required non-PEHE to carry on a trade, business, or profession in Singapore. IHEs might not meet this condition as they are passive holding entities.

MOF response: Partially accepted. The current definition of PEHE is aligned with the internationally accepted definition (as referenced in the BEPS Action 5 2017 Progress Report). Hence, we are unable to expand the PEHE definition as suggested. However, we agree that IHEs may not carry on a trade, business or profession in Singapore. The requirement for non-PEHEs to carry on a trade, business, or profession in Singapore will therefore be removed.

Public feedback: To prescribe in legislation bright-line tests (such as prescribing minimum thresholds) to establish whether economic substance requirements are met. This will reduce uncertainty for taxpayers in determining if disposal gains are subject to tax.

MOF response: Not accepted. It will not be practical to prescribe in legislation minimum thresholds to establish economic substance as business models and scale of operations of entities may vary even within the same sector. Instead, IRAS will provide further guidance through an e-Tax Guide, including examples for certain sectors.

As noted in the MOF response, the IRAS will provide guidance on the economic substance requirements in an e-Tax guide, which is expected prior to 1 January 2024.

Country by Country Reporting

On 20 July 2023, the Inland Revenue Authority of Singapore (IRAS) published an updated list of jurisdictions with which Singapore will exchange Country-by-Country (CbC) reports under the Multilateral Competent Authority Agreement on Automatic Exchange of Country-by-Country Reports (2016) (CbC MCAA). Aruba has been added to the list of jurisdictions, with effect from fiscal years beginning 1 May 2021.

International Tax Developments

On 8 August 2023, Russia signed Decree No. 585, temporarily suspending specific provisions of 38 of its double tax treaties with what it considers to be unfriendly countries, including its tax treaty with Singapore. While the tax treaties themselves will continue to hold validity, the suspension primarily impacts reduced tax rates on dividends, interest, and royalties applicable to businesses. As of now, there are no intentions to terminate these treaties. In as far as Asian countries is concerned, the suspension includes Russia's tax treaties with Japan, Korea and Singapore, respectively.

JURISDICTION:

Taiwan

Trade Agreement with the US

On 7 August 2023, the President of the United States signed into law H.R. 4004 for the implementation (First Agreement Implementation Act) of the 21st-Century Trade Initiative, signed on 1 June 2023, between Chinese Taipei and the United States. The initiative was previously approved by the House of Representatives on 21 June 2023 and by the Senate on 18 July 2023.

Double Tax Treaty with the US

On 12 July 2023, the House Ways & Means Committee Chairman, along with the Senate Finance Committee Ranking Member, the House Ways & Means Committee Ranking Member, and the Senate Finance Committee Chairman, jointly released a discussion draft of legislation aimed at alleviating double taxation issues faced by workers and businesses involved in United States-Taiwan cross-border investment. The proposed bill offers several advantages, including a significant reduction in withholding taxes on dividends, interest, and royalties related to these cross-border investments. It also seeks to remove barriers for smaller businesses engaging in such investments, simplify the process for individuals with dual residency, and foster deeper economic cooperation with Taiwan.

A reduced rate on withholding taxes would apply to certain income from U.S. sources received by qualified residents of Taiwan, such as interest, dividends, royalties, and certain other comparable payments, such as dividend equivalent amounts. Instead of the 30 percent withholding tax presently imposed on U.S. source income received by nonresident aliens and foreign corporations, interest and royalties would be subject to a 10 percent withholding tax rate. Generally, dividends would be subject to a 15 percent withholding tax rate. Dividends would be subject to a lower 10 percent rate if paid to a recipient that owns at least ten percent of the shares of stock in the corporation, subject to limitations.

Another important point to note is that the threshold of whether a qualified resident of Taiwan's income from a U.S. trade or business is subject to U.S. income tax will be raised to the permanent establishment standard in treaties, rather than the U.S. trade or business standard applied in the IRC. The bill provides that the income which is subject to U.S. income tax is only taxable income effectively connected to a United States permanent establishment of a qualified resident of Taiwan.

Global Minimum Tax Regime (BEPS Pillar 2)

In order to assist multinational enterprises in adapting to a global minimum tax under the Pillar Two GloBE Model Rules, the Ministry of Finance (MOF) has noted that a review of the domestic tax system, providing appropriate tax incentives to maintain the effective tax rate for domestic enterprises at 15% and reducing the compliance costs of multinational enterprises will be a top priority. While Taiwan is not a member of the OECD/G20 BEPS Inclusive Framework, it is following the latest international tax development trends and planning in accordance with the GloBE rules, including having a qualified domestic minimum top-up tax (QDMTT), in order to preserve its taxing rights.

In the short term, the MOF will evaluate industry recommendations to increase the rate of income basic tax from 12% to 15% (statutorily, the tax rate must be between 12% and 15%). In the medium term, the MOF will consider introducing a QDMTT to meet international standards. In the long term, the MOF will evaluate a suitable timing to introduce the income inclusion rule (IIR) and undertaxed payments rule (UTPR) depending on the progress of implementation in other countries. However, no specific timeline for legislation and implementation has been set. The MOF stated that it will continue to pay attention to OECD developments and observe the progress of major international countries in implementing Pillar Two, and consult with all sectors on integrating with the international tax system.

The MOF had previously announced that the taxation administration would be preparing amendments to the Income Tax Act for proposal to parliament in 2023, and the expected implementation date would be 1 January 2024 but no measures had been made as yet.

JURISDICTION:

Thailand

Personal Income Tax on Offshore Income

Courtesy DFDL in Thailand it was reported that on September 15, 2023, the Thai Revenue Department issued an unexpected departmental instruction (No.161/2566) that fundamentally changes a long-standing and well recognized rule of personal income tax regarding Thai taxation of offshore income.

Previously, offshore (i.e., non-Thai) income earned by a Thai resident taxpayer was not taxable unless remitted into Thailand in the same calendar year it was earned. This rule has been relied upon for many years and is considered a standard rule of practice for both Thai nationals and foreigners, who happen to be residents of Thailand for tax purposes (i.e., individuals residing in Thailand for 180 days or more in any calendar year).

This new instruction significantly alters the pervious approach and will have significant implications for not just newly earned foreign source income but previously earned income maintained offshore. The new position is that any foreign (i.e., non-Thai) source income earned outside Thailand will be subject to Thai personal income tax regardless of when it is remitted into Thailand. This changes what was a permanent exemption from taxation on such income into a mere deferred tax liability, to be paid in ANY year the income is eventually repatriated.

In addition to surprising everyone with this change, the Revenue Department has also taken an aggressive position by making the effective date 1 January 2024. As it stands now, any and all offshore income earned this year or hereafter will be subject to taxation upon repatriation, however, it appears that any income earned prior to 1 January 2023, but repatriated before the current year end should not be subject to this new rule and not subject to taxation.

Individuals having accumulated offshore income earned prior to 1 January 2023 and planning to bring it to Thailand may consider to repatriate the income to Thailand prior to 31 December 2023.

Value Added Tax

The Thai Cabinet has approved a draft decree extending the reduction of the value added tax rate until 30 September 2024. The reduced rate of 7% (inclusive of local taxes) was set to return to 10% after 30 September 2023. Consequently, the VAT rate will continue to be 7% until 30 September 2024.

Automatic Exchange of Information on Financial Accounts (CRS-MCAA)

On 11 August 2023, the Director-General of the Revenue Department announced the rules, procedures, conditions and forms of the Multilateral Competent Authority Agreement on Automatic Exchange of Information Agreement (2014) (CRS-MCAA) on the introduction of the automatic exchange of information in tax matters on a reciprocal basis. The announcement was published in the Government Gazette of 15 August 2023, as released on 16 August 2023. The announcement entered into force the day following the date of its publication in the Government Gazette.

The CRS MCAA (Common Reporting Standard Multilateral Competent Authority Agreement) is an agreement, based on article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (1988), as amended by the 2010 protocol, that allows countries to automatically exchange financial account information with each other. This helps in combating tax evasion by ensuring that tax authorities have access to information about taxpayers' financial accounts in other countries.

FATCA with United States

On 9 August 2023, the Thai Minister of Finance issued a ministerial regulation on collecting and submitting information that is required to be reported to the competent authorities as required under the not yet in force Thailand - United States FATCA Model 1A Agreement (2016). This regulation establishes key definitions and procedures for ensuring cross-border tax compliance. The ministerial regulation was published in the Royal Gazette of 18 August 2023.

JURISDICTION:

Vietnam

Pillar 2 – Global Minimum Tax of 15%

The government will submit to the National Assembly a draft resolution proposing to implement the global minimum tax rules under Pillar Two in Vietnam in 2024. The draft resolution includes the introduction of a qualified domestic minimum top-up tax and the income inclusion rule.

The impact assessment report accompanying the draft notes that the implementation of the global minimum tax rules will open new opportunities for Vietnam, including additional tax revenues, enhance integration with the international community and minimize tax evasion and profit shifting. At the same time, it acknowledges that Vietnam will need to develop non-tax-based investment policies to retain and attract foreign investment.

Proposed amendments to the Enterprise Income Tax Law will also consider the impact of the global minimum tax rules on tax incentives and foreign investment in Vietnam. The draft resolution will take effect from 1 January 2024 until it is superseded by the amended Enterprise Income Tax Law. Public comments are invited via the government electronic portal (in Vietnamese). The draft resolution will be submitted for approval to the National Assembly in October 2023.

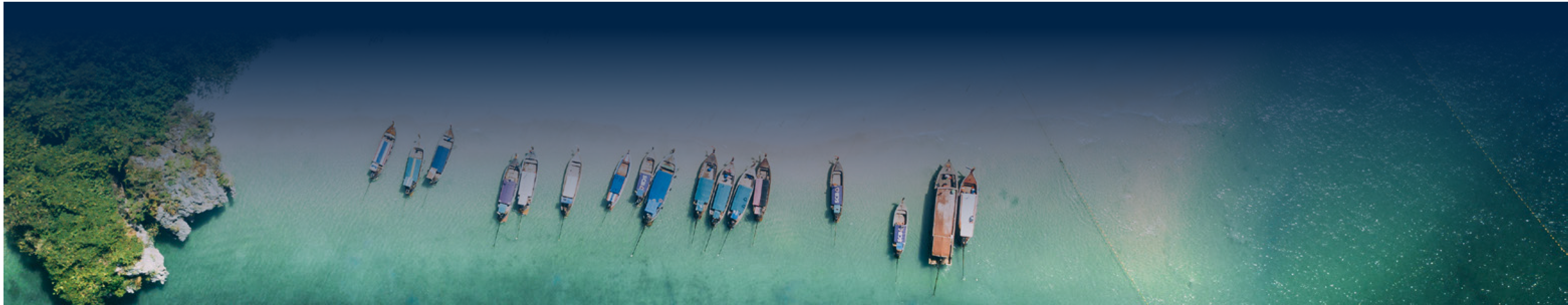
Multilateral Convention (MLI) BEPS

On 28 July 2023, Vietnam gazetted Notice No. 12/2023/TB-LPQT of 21 June 2023 for the entry into force of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). With this, Vietnam has adopted anti tax avoidance measures laid down in the MLI as signed by over 130 countries globally. This will have its influence in the way investments in Vietnam will be structured going forward.

On 1 September 2023, the MLI entered into force in respect of Vietnam. Vietnam signed the convention on 9 February 2022 and deposited its final MLI Position on 23 May 2023, including the 75 tax treaties that it wishes to be covered by the MLI. For a treaty to be covered by the MLI, both signatories need to have a) joined the convention, b) included each other in their list of covered tax agreements, and c) deposited their instrument of ratification, acceptance or approval.

Free Trade Agreement with Israel

On 25 July 2023, Israel and Vietnam signed a free trade agreement (VIFTA), in Israel. The FTA is the result of seven years of negotiations, consisting of 12 rounds of negotiations. This VIFTA is the first free trade agreement between Vietnam and a West Asian nation, and also the first FTA between Israel and a Southeast Asian country. Under the VIFTA, duties will be removed on approximately 86% of Vietnamese products.



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Pieter de Ridder
Partner, Mayer Brown
+65 6922 2240
pieter.deridder@mayerbrown.com

Pieter de Ridder is a Partner of Mayer Brown LLP and is a member of the Global Tax Transactions and Consulting Group. Pieter has over two decades of experience in Asia advising multinational companies and institutions with interests in one or more Asian jurisdictions on theirinbound and outbound work.

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

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