APAC News

30 September 2017
Volume 9, Issue 3

Tax transparency & new measures

This issue of our Newsletter covers mainly development in the Region on tax transparency and new measures.

Australia starts off with an update regarding the new threshold on capital gains tax withholding that became effective from 1 July 2017.

China reports on new measures to promote foreign investment growth, which include, amongst other things, tax incentives.

Hong Kong has responded to the OECD BEPS actions and released a Consultation Report to implement a transfer pricing regime. TP documentation will become mandatory under stipulated conditions.

The Indonesian article is on new legislation to access financial information for taxation purpose, which is largely along the line of Common Reporting Standard.

New Companies Act has been introduced in Malaysia to enhance the corporate legal framework. The key changes are summarized in this Newsletter.

Finally, we have a comprehensive summary on the new transfer pricing rules in Singapore.

News of our Regional firms

Whilst on Singapore, we are pleased to report the appointment of two new partners to our Singapore network firm, Steven Tan Russell Bedford PAC. They are Eugene YIO and KI Lian Hang. They have, between them, over 30 years of experience in audit and assurance and bring with them extensive knowledge in IFRS and experience in managing audits in a wide range of industries, including reporting to international clients.

Inside this issue:

AUSTRALIA

SAWARD DAWSON
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New Threshold for Capital Gains withholding

As from 1 July 2017, if a foreign resident disposes of Australian real property with a market value of $750,000 or more, the purchaser will be required to withhold 12.5% of the purchase price and pay it to the ATO unless the seller provides a variation; this is referred to as a "foreign resident capital gains withholding".

Also, Australian residents who dispose of Australian real property with a market value of $750K or more will need to apply for a "clearance certificate" from the ATO to ensure that amounts are not withheld from their sale proceeds.

Therefore all these transactions will require both the vendor and the buyer to consider if a clearance certificate is required.

The existing threshold and rate will apply for any contracts that were entered into from 1 July 2016 and before 1 July 2017, even if they are due to settle after 1 July 2017.

CHINA

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RUSSELL BEDFORD HUA-ANDER

China to Promote Foreign Investments

The State Council of China issued on 16 August 2017 the "Notice on Several Measures to Promote Foreign Investment Growth". A series of measures to promote growth and raise the quality of foreign investment are set out. The following are some key policies:

" …tax incentives granted to Advance Technology Service Enterprises … will be rolled out nationwise…"

- China will expand market access to allow foreign capital to enter sectors including new-energy vehicle manufacturing, ship design, aircraft maintenance and railway passenger transportation, banking and insurance. The "negative-list" approach piloted in free trade zones will be rolled out nationwide, where foreign investors engaged in activities that are not included on the "negative list" will enjoy the same treatment as domestic investors and hence can apply for the simplified entity set-up procedures.

- The government will also make fiscal and taxation support policies to encourage overseas investors to expand investment and make use of their role in optimizing the service trade structure. Multinationals are encouraged to set up regional headquarters in the country and invest into western areas and old northeastern industrial bases. The overseas investors who directly invest the encouraged investment projects with the profits distributed from domestic resident enterprises will enjoy the deferred tax policy and be temporarily exempted from the withholding income tax, if they are eligible to the stipulated regulations. In addition, tax incentives granted to Advanced Technology Service Enterprises in pilot areas will be rolled out nationwide; the 15% income tax rate will be used to attract foreign investments in high-tech and high value-added service industry.

- Efforts will also be stepped up to improve foreign capital-related laws, provide better services to overseas investors and ensure the free outward remittance of their profits. China

will improve the protection of intellectual property rights, raise the competitiveness of the research and development environment and maintain continuity of foreign investment policies.

•China will streamline the working permit/visa process for foreign talents working in China. Before the end of this year, China will release detailed new rules for granting visas to foreign professionals including extending the validity period. For eligible foreigners, long-term (5 to 10 years) multiple return visa will be issued, and work permit and work class residence permit can be applied for accordingly.

The Notice came out as foreign direct investment (FDI) inflow dropped by 1.2 percent year on year in the first seven months of this year, data from the Ministry of Commerce. According to the United Nations Conference on Trade and Development (UNCTAD), China received 139 billion U.S. dollars of FDI in 2016, third in the world behind the US and the UK.

CHINA

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Consultation Report on BEPS actions

HONG KONG

The Government released on 31 July 2017 the consultation report on measures to counter base erosion and profit shifting (BEPS) by enterprises.

In June 2016, Hong Kong indicated its commitment to implement the BEPS package of actions recommended by OECD. Following that, the Government conducted a consultation inviting public comments relating to a number of proposed actions. In total, 26 written submissions were received.

"We welcome the general support from the respondents for the proposed implementation strategy, which focuses on the four minimum standards set by the OECD (i.e. countering harmful tax practices, preventing treaty abuse, imposing a country-by-country reporting requirement and improving the cross-border dispute resolution mechanism) whilst maintaining Hong Kong's simple and low tax regime. Having regard to the comments received, we will fine-tune certain parameters of the proposals to address stakeholders' concerns," a Government spokesman said when releasing the consultation report.

The Report sets out the following key proposals to implement a new transfer pricing (TP) regime in Hong Kong.

Exemption threshold for TP documents

Enterprises with related party transactions (RPT) will be required to prepare TP documentations based on threshold as follows:

" …focuses on the four minimum standards set by the OECD…whilst maintaining … simple and low tax regime…"

HONG KONG

(Continued)

Threshold for preparing Local and Master files		Equal or exceed
Size Test **2 out of 3 criteria**	Total annual revenue Total assets Employees	HK$200 million HK$200 million 100
RPT value Test	Transfer of properties Transactions in financial assets Transfer of intangibles Any other transactions (e.g. service fee, royalty	HK$220 million HK$110 million HK$110 million HK$44 million
Threshold for preparing Country-by-Country reports		
Size Test	Total annual revenue	Euro 750 million (in conformity with OECD mandated requirement

"…responded by extending the tax regime for offshore aircraft leasing activities…to onshore aircraft leasing activities…"

Domestic transactions

The proposed TP regime will also cover transactions between domestic parties so that the compliance requirement on arm's length principle is the same as cross-border transactions.

Intellectual properties

Due to practical difficulties in determining TP using conventional TP rules, specific provisions will be introduced for TP relating to DEMPE (develop, enhance, maintain, protect and exploit) functions in Hong Kong.

Penalties

Penalties arising from TP adjustments will be imposed in the same manner as penalties as currently applicable to incorrect returns, i.e. up to a maximum of 3 times of the tax undercharged for cases without reasonable excuse or willful with intent to evade tax. Each case will be dealt with based on the actual facts and circumstances leading to the TP adjustments. The keeping of contemporaneous TP documentation may likely be a mitigation factor when considering the level of penalties.

APA / arbitration

The implementation of the TP regime will mean more demand for APA (advance pricing arrangement) and the need of dispute resolution mechanism. A practice note will be issued by the IRD to address the relevant mechanism.

Spontaneous exchange of tax rulings

As mandated by the OECD, Hong Kong will conduct spontaneous exchange of information on tax rulings with the relevant jurisdictions, in respect of both past and future rulings.

Harmful tax practice

This refers to preferential tax treatment granted by a jurisdiction exclusively to non-residents and is ring-fenced from application to domestic taxpayers. The Forum on Harmful Tax Practice (FHTP), a working group under the OECD, is actively reviewing such practice. Failure to address the FHTP's concern will jeopardize Hong Kong's reputation as an international financing centre. In this respect, Hong Kong has proactively responded by extending the tax regime for offshore aircraft leasing activities (where qualifying profits of qualifying aircraft lessors or managers are taxed at the concessionary half rate, i.e. 8.25%) to onshore aircraft leasing activities.

Thin capitalization

Thin capitalization rules

will not be introduced in Hong Kong.

Timing for claim of tax credit

The time limit for claiming foreign tax credit shall be extended to 6 years (currently 2 years).

Timeline

The current plan of the Government is to press ahead with the preparatory work to introduce an amendment bill to the Legislative Council by the end of 2017. The target is to have the legislature in place for rolling out in tax year 2018/19 if everything goes smoothly.

HONG KONG

(Continued)

New Regulation on Access to Financial Information For Taxation Purpose

INDONESIA

The Government of Indonesia has recently issued a new regulation on Access to Financial Information for Taxation Purpose. The main consideration behind the issuance of this new regulation is that in order to optimise the tax revenues, the tax authority needs a wide access to receive financial information for the purpose of taxation. In addition, the Government of Indonesia is required to comply with the international tax agreement to implement *Automatic Exchange of Financial Account Information* starting before 30 June 2017.

The access to financial information for taxation purpose as defined in this new regulation including access to receive and obtain financial information in the framework of implementation of tax regulations and the implementation of the international tax agreement. The Directorate General of Taxation, as the authorised tax regulator in Indonesia, is entitled to have access to financial information for the purpose of taxation from the financial institutions that operate in the banking sector, capital market, insurance, other financial institutions, and/or other entities categorised as financial institutions in accordance to the financial information exchange standard based on the international tax agreement. On the other hand, financial institutions, other financial institutions, and/or other entities are required to submit reports to the Directorate General of Taxation which include the following:

a) Reports presenting financial information in accordance to the financial information exchange standard based on the international tax agreement for each financial account that is identified as financial accounting that is required to be reported; and,

b) Reports containing financial information for taxation purpose which is managed by the respective financial institutions, other financial institutions, and/or other such entities for a period of one calendar year.

Apart from the reports

"… to comply with the international tax agreement to implement Automatic Exchange of Financial Account Information…"

INDONESIA

(Continued)

that present the said above financial information, the Directorate General of Taxation is also authorised to inquire information and/or evidence or clarification from the financial institutions, other financial institutions, and/or other such entities. The reports of financial information shall be submitted to the Directorate General of Taxation and shall include at least the following information:

1) identity of the financial account holder,

2) financial account number,

3) identity of the financial institutions,

4) balance or the value in the financial account, and

5) income related to the financial account.

The whole of the said above information and/or evidence or clarification shall be used as the taxation data basis by the Directorate General of Taxation. In addition to that, according to the international tax agreement, the Minister of Finance authorised to execute financial information exchange and/or information and/or evidence or clarification with their authorized party in difference country or jurisdiction.

" …financial entities are required to conduct identification on financial information…"

The financial institutions, other financial institutions, and/or other such entities are required to conduct identification on financial information which covers at least the following procedures:

a. Verification on the domicile country of the financial account holder, both individual and entities;

b. Verification to determine the bearer of the financial account;

c. Verification to determine the financial account owned by the owner of financial accounts;

d. Verification on the entity of the financial account bearer in order to determine the controlling party of the entity; and

e. Documentation of the activities conducted as a procedure to identify financial accounts, which include keeping the documents obtained or used.

Should in the process of identification, a customer is identified to deny to comply with the rules on account identification, the respected financial institution, other financial institution, and/or other such entity shall be restricted from:

a) administering a new financial account for a new customer; or

b) executing new transaction on financial accounts for the existing customers.

Due to the potential conflict in providing financial account information to the Directorate General of Taxation against the obligation to safeguard the confidentiality of customers, thus in case other regulations requiring confidentiality to be respected by financial institutions, other financial institutions, and other such entities, this new regulation on Access to Financial Information for Taxation Purpose, stated that, for the purpose of taxation, such privacy requirements as said above shall be declared void. Therefore financial institutions, financial-service institutions, other financial institutions, and such other entities as stiputed in this new regulation shall allow access of information by the tax authority.

Malaysian Companies ACT 2016

MALAYSIA

Russell Bedford

RUSSELL BEDFORD MALAYSIA

The Companies Act 2016 ("CA 2016") and the Companies Regulations 2017 came into force on 31 January 2017 to replace the Companies Act 1965. The aim of the CA 2016 is to enhance the robustness of the corporate legal framework.

Some of the key changes and areas of focus are as follows:

INCORPORATION AND ADMINISTRATION

(a) Memorandum and Articles of Association ("M&A")

Under the CA 2016, the requirement to have a M&A is no longer mandatory for companies incorporated on or after 31 January 2017.

(b)Single member / director company

A private company is allowed to be incorporated by or have only a single member and that single member can also be the sole director of the company. The single member can be either an individual or a corporate body (Malaysian or foreign)

For a public company, the minimum requirement of 2 resident directors is still applicable.

(c) Annual General Meeting ("AGM") for private companies

Beginning from 31 January 2017, private companies are no longer required to hold AGMs as all decisions can be made through the passing of resolutions.

(d) Common seal

The requirement to have a common seal has been made optional. Documents can be formally executed through the signature of 2 authorised officers (one must be a director or in the case of single director company, by that director in the presence of a witness).

(e) Lodgement of annual return

Annual return to be lodged within 30 days from each anniversary date of the company's incorporation.

(f) Lodgement of financial statements

Public company – 30 days after the date of AGM

Private company – 30 days from the time of circulation to its members

SHARE CAPITAL STRUCTURE

(a) Share with no par value

All shares issued before or after the commencement of the CA 2016 will have no par value and nominal value. The value of shares is determined by the directors during the time of issuance of shares.

(b) Share premium

Any credit balance in share premium account must be utilized within 24 months from 31 January 2017. After which, the balance will be credited to share capital account.

SOLVENCY TEST AND STATEMENT

(a) Solvency test

The CA 2016 requires the solvency test to be complied with in relation to (i) to (iv) below to ensure that the company has the ability to pay off its debts:

(i) Redemption of redeemable preference shares;

(ii) Reduction of capital;

(iii) Giving financial assistance; and

(iv) Share buy back

(b) Solvency statement

The solvency statement allows directors to form

" …aim to enhance the robustness of the corporate legal framework…"

MALAYSIA

(Continued)

an opinion that the company satisfies the solvency test based on:

(a) enquiry into the company's state of affairs; and

(b) consideration of all the company's liabilities including contingent liabilities.

DIVIDEND DISTRIBUTION

(a) Stricter requirement imposed on dividend distribution

In addition to the rule of distributing dividend only out of profits, a company shall distribute dividend only if it is also solvent. A company is considered solvent if it is able to pay off its debts as and when they become due within 12 months immediately after the dividend distribution is made.

SINGAPORE

Singapore Transfer Pricing Developments

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" …strengthen the transfer pricing regime and introduce a mandatory transfer pricing documentation requirement…"

Singapore proposes to legislate mandatory TP documentation requirement and penalties

The Ministry of Finance has recently conducted a public consultation on the draft Income Tax (Amendment) Bill 2017. The Bill includes an amendment to "strengthen the transfer pricing regime and introduce a mandatory transfer pricing documentation ("TPD") requirement" as well as penalties for non-compliance. We summarise the key proposed changes as follows:

Introduction of mandatory TPD requirement and penalties for non-compliance

Current:

Currently, the existing Singapore TP Guidelines require taxpayers to "prepare and keep contemporaneous records" and this is to be "part of the record-keeping requirement for tax", which is generally taken to refer to Section 65, 65A and 65B of the Singapore Income Tax Act ("SITA"). All taxpayers must prepare TPD unless they meet certain safe-harbour thresholds for exemption from preparing TPD. For intercompany sales/purchases of goods/loans, TPD is not required where the value of the transaction does not exceed S$15 million; and S$1 million for all other categories of related party transactions, such as service income/expense.

If a taxpayer fails to submit adequate documentation on time upon request by the Inland Revenue Authority of Singapore ("IRAS"), there is currently no specific penalty but he may be subject to a general offence penalty which may involve a fine not exceeding S$1,000 or a jail term not exceeding 6 months in default of such payment.

Proposed:

It is proposed that a new Section 34F will be introduced in the SITA to legislate the requirement to maintain contemporaneous and adequate TPD. The new proposed legislation has codified the requirement to prepare the TPD no later than the filing deadline of the tax return and the submission of the TPD to the IRAS within 30 days of such request and specifically, require the TPD to be retained for 5 years.

To limit the compliance burden for smaller businesses and as an additional safe-harbour to the existing thresholds, the mandatory TPD requirement will only apply to businesses with turnover exceeding S$10 million. To illustrate, assuming a company with only one related party transaction, the determination of TPD requirements would be as follows:

	Service income form related party	Gross revenue	TPD required
Current	>S$1 million	<S$10 million	Yes (as current safe-harbour threshold exceeded)
Proposed	>S$1 million	<S$10 million	No

In addition, it is now legislated that a specific fine up to S$10,000 may be imposed for offences such as failure to prepare contemporaneous and adequate TPD, failure to submit TPD within 30 days of notice, failure to retain TPD for 5 years and submission of false or misleading TPD.

The above amendments will take effect from the Year of Assessment ("YA") 2019.

Introduction of surcharge on TP adjustments

A new Section 34E will be added to introduce a surcharge on any TP adjustment made. The surcharge will be imposed, at the discretion of the IRAS, when the IRAS has made TP adjustment under Section 34D and is equal to 5% of the amount of increase in income or reduction in deduction, allowance or losses. The surcharge will apply from YA 2019.

Lifting of time bar for MAP cases

Section 74 will be amended to lift the statutory time limit of 4 years for the IRAS to raise additional assessments for cases under the Mutual Agreement Procedures ("MAP") process. This would provide taxpayers with certainty that the outcome of the MAP agreed with the relevant foreign competent authority can be given full effect by the IRAS.

TPD required to support claim for error or mistake

Section 93A will be amended to clarify that any claim for error or mistake on TP made in the tax return by the taxpayer must be supported by contemporaneous and adequate TPD.

Clarification of existing powers to enforce the arm's length principle

Currently, the existing Section 34D of the SITA empowers the IRAS to make a tax adjustment if the taxpayer's taxable profit is understated due to non-arm's length related party transactions.

It is clarified that the determination of arm's length principle would also consider arm's length "circumstances" i.e., whether third parties

" …amendments will take effect from the year of Assessment("YA") 2019…"

SINGAPORE

(Continued)

" …imputed interest is likely to be treated as foreign source interest but received in Singapore…"

would reasonably enter or not enter into similar transactions/ arrangements. The new proposed legislation gives IRAS the power to disregard the form of actual commercial or financial relations between related parties and to make necessary adjustments in situation where the substance of the transaction is inconsistent with the form of the transaction.

In addition, a specific provision is proposed to treat any income adjustment to be "accruing in or derived from Singapore or received in Singapore from outside Singapore". This would deem the income adjustment to be considered Singapore sourced or foreign sourced but received in Singapore. With this specific provision, for cross border loans, in the event where the Singapore lender does not charge any interest or charges non-arm's length interest rate, any imputed interest is likely to be treated as foreign source income but received in Singapore and therefore taxable in Singapore. Currently, such imputed interest would be treated as foreign source income which is not remitted into Singapore and therefore not subject to tax in Singapore until it is remitted into Singapore.

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