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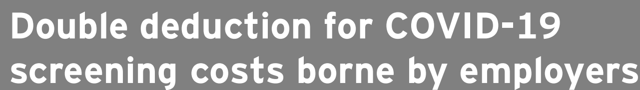
Malaysian developments

Update on Malaysia's double tax agreement with Cambodia

The Malaysia-Cambodia double taxation relief agreement (DTA), which was signed on 3 September 2019, entered into force on 28 December 2020 and is effective from 1 January 2021. The following table summarizes some of the withholding tax rates under the DTA in respect of payments from Malaysia to a Cambodian resident:

Payments	Withholding tax rate	
	Normal rate	DTA rate
Interest	15%	0% / 10% Note
Royalties	10%	10%
Fees for technical services	10%	10%

Note:
The 0% applies if the recipient is the Government of Cambodia or certain qualifying institutions of Cambodia. In other cases, the 10% rate applies.



Double deduction for COVID-19 screening costs borne by employers

Following the announcement of the Perlindungan Ekonomi & Rakyat Malaysia (PERMAI) Assistance Package on 18 January 2021 (see *Special Tax Alert No. 1/2021*), the Finance Minister of Malaysia, Tengku Dato' Sri Zafrul Tengku Abdul Aziz has further announced that as part of the PERMAI Assistance Package, employers who bore the COVID-19 screening costs for their employees from 1 January to 31 December 2020, will be eligible for a double deduction.

Substantial activity requirements for a Labuan International Commodity Trading Company (LITC)

The substantial activity requirements for a Labuan International Commodity Trading Company (LITC) were removed from the Labuan Business Activity Tax Act (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 [P.U.(A) 375], which were gazetted on 24 December 2020. The Labuan Investment Committee (LIC) has recently issued LIC Pronouncement 4-2020 dated 9 February 2021, to clarify that the substantial activity requirements for LITCs will be regulated under a separate gazette order which will be released in due course.

Frequently Asked Questions on International Tax issues due to the COVID-19 Travel Restrictions

The Inland Revenue Board (IRB) has recently published an updated version of the "Frequently Asked Questions on International Tax Issues due to the COVID-19 Travel Restrictions" (FAQs) document, dated 9 February 2021, which addresses questions pertaining to the following:

(a) Residency status of individuals and companies
(b) Creation of permanent establishments (PEs)
(c) Cross-border employment income for individuals

The updated FAQs are broadly similar to the earlier FAQs (see *Special Tax Alert No. 12/2020*, *Tax Alert No. 14/2020* and *Tax Alert No. 19/2020*). The key changes are as follows:

- The updated FAQs clarify that references to the Movement Control Order (MCO) period is from 18 March 2020 and as prescribed and extended by the Ministerial order made under Section 11 of the Prevention and Control of Infectious Diseases Act 1988, and as gazetted from time to time. Previously, the MCO period was stated in the FAQs document as being from 18 March 2020 until 31 December 2020.

- The updated FAQs stipulate that the relevant documentation that must be kept and submitted to the IRB upon request (to prove that a taxpayer qualifies for the concessions stated in the FAQs) includes documents proving one's effort to leave or return to Malaysia (e.g. responses from the Immigration Department of Malaysia or airlines) during the MCO period.

- The updated FAQs also clarify that applications for the tax treatment based on the FAQs must be referred to the IRB branch which handles the taxpayer's income tax file. If an income tax file has not been registered, then applications should be submitted to the Non-Resident Branch. All applications will be reviewed based on the merits of each case. In addition, confirmations from relevant foreign tax authorities may also be requested if the need arises.

Tax incentives for the employment of senior citizens, ex-convicts, parolees, supervised persons and ex-drug dependents

To further encourage the employment of senior citizens (i.e. those above 60 years of age), ex-convicts, parolees, supervised persons and ex-drug dependents, in Budget 2021 the Government proposed that the further deductions given on the remuneration of such individuals employed in a full-time capacity be extended to the year of assessment (YA) 2025 (see *Take 5: Malaysia Budget 2021*). The monthly remuneration for employees in these categories cannot exceed RM4,000.

This proposal has now been legislated pursuant to the Income Tax (Deduction for Employment of Senior Citizen, Ex-Convict, Parolee, Supervised Person and Ex-Drug Dependant) (Amendment) Rules 2021 [P.U.(A) 47] gazetted on 9 February 2021.

Real property gains tax exemption on the disposal of low-cost, medium-low and affordable residential homes

The Real Property Gains Tax (Exemption) Order 2018 [P.U.(A) 360], gazetted on 28 December 2018, provides that a Malaysian citizen individual is exempted from real property gains tax (RPGT) on the chargeable gain derived from the disposal of a chargeable asset, other than shares, from 1 January 2019 (see *Tax Alert No. 1/2019*). This Order will apply only if:

(a) The disposal of the chargeable asset is made in the 6th year after the acquisition date of the chargeable asset, or any year thereafter; and
(b) The disposal consideration of the chargeable asset is not more than RM200,000.

Following the above, Real Property Gains Tax (Exemption) 2018 (Amendment) Order 2021 [P.U.(A) 48] was gazetted on 9 February 2021. The Amendment Order provides that in addition to point (a) above, the exemption will now apply only if:

(i) The disposal consideration or market value, whichever is the higher, of the chargeable asset is not more than RM200,000; and
(ii) The total consideration or market value, whichever is the higher, of the chargeable asset as a whole is not more than RM200,000.

You would note that the Amendment Order tightens the qualifying conditions for the RPGT exemption. Based on the Amendment Order, where part of a chargeable asset is disposed, RPGT exemption will not be available unless the market value of the whole chargeable asset (and not just the part disposed) is RM200,000 or less.

Stamp duty exemptions on the purchase of first residential homes

To further encourage Malaysians to purchase their first home, in Budget 2021 the Government proposed to waive the stamp duty on the instruments of transfer and loan agreements for the purchase of first residential homes valued up to RM500,000 (previously RM300,000). The exemptions are applicable for sale and purchase agreements (SPAs)

executed between 1 January 2021 and 31 December 2025 (see *Take 5: Malaysia Budget 2021*).

To legislate this proposal, the following Exemption Orders were gazetted on 10 February 2021 and are deemed to have come into operation on 1 January 2021:

- Stamp Duty (Exemption) Order 2021 [P.U.(A) 53]
- Stamp Duty (Exemption) (No. 2) Order 2021 [P.U.(A) 54]

The Exemption Orders will apply to only one unit of residential property, on condition that:

(a) The SPA is executed between 1 January 2021 and 31 December 2025; and
(b) The individual has never owned any residential property, including a residential property obtained by way of inheritance or gift, which is held either individually or jointly.

The application for the exemptions will have to be accompanied by a statutory declaration (under the Statutory Declarations Act 1960) by the individual confirming point (b) above.

The definitions below are also outlined in the Orders:

a. **Residential property**
A house, a condominium unit, an apartment or a flat purchased or obtained solely to be used as a dwelling house

b. **Individual**
Purchaser or co-purchaser of a residential property who is a Malaysian citizen

Stamp Duty (Exemption) Order 2021

The Order provides that all instruments of transfer executed in relation to the purchase of a residential property valued up to RM500,000 (based on market value) by an individual, will be exempted from stamp duty.

Income Tax (Exemption) (No. 2) Order 2021 [P.U.(A) 54]

The Order provides that any loan agreement to finance the purchase of a residential property valued up to RM500,000, will be exempted from stamp duty. This Order applies to loan agreements executed between the individual (as named in the SPA) and the following:

(a) A licensed bank under the Financial Services Act 2013 (FSA)
(b) A licensed Islamic bank under the Islamic FSA
(c) A development financial institution prescribed under the Development Financial Institutions Act 2002
(d) A licensed insurer under the FSA
(e) A licensed takaful operator under the Islamic FSA
(f) A co-operative society registered under the Co-operative Societies Act 1993
(g) Any employer who provides an employee housing loan scheme
(h) The Borneo Housing Mortgage Finance Berhad incorporated under the Companies Act 2016 (CA) or
(i) The Mutiara Mortgage and Credit Sdn Bhd incorporated under the CA

Guidelines on the application for green technology tax incentives

In Budget 2020, the Government proposed to extend the green technology incentives for another three years (i.e. until YA 2023) and expand the scope of the incentives to include companies undertaking solar leasing activities (see *Special Tax Alert: Highlights of Budget 2020*).

In line with the above-mentioned proposals, the updated "Guidelines for Green Technology Tax Incentive (GITA / GITE)" were recently published on the MyHijau website to provide guidance on the following tax incentives:

(a) Green Investment Tax Allowance (GITA) Assets
(b) Green Investment Tax Allowance (GITA) Project
(c) Green Income Tax Exemption (GITE) Services
(d) Green Income Tax Exemption (GITE) Leasing

As applications for GITA Assets are to be submitted to the Malaysian Green Technology and Climate Change Centre (MGTC), whereas applications for the remaining incentives (i.e. Points (b) to (d) above) are to be submitted to the Malaysian Investment Development Authority (MIDA), MIDA has also published on its website the latest "Guidelines on application for incentive and/or expatriate posts for green technology" dated 25 January 2021, to explain the incentives under its care.

The key details for the above-mentioned incentives are summarized in the Appendix to this Alert.

Further details on the incentives and guidelines are available on the following websites:

- MyHijau website [GREEN INCENTIVES - MyHIJAU]
- MIDA website [Forms & Guidelines - MIDA | Malaysian Investment Development Authority → Services sector → F) Green Technology]

Overseas developments

India's Finance Bill 2021 clarifies scope of e-commerce Equalization Levy

India's Finance Act 2020 (FA 2020) expanded the scope of the digital tax levy known as the Equalization Levy (EL) to cover "e-commerce supplies or services". The EL covers a range of digital transactions, including business-to-business (B2B) transactions, business-to-consumer (B2C) transactions, e-commerce marketplaces and digital services.

With effect from 1 April 2020, EL is chargeable at the rate of 2% on consideration received or receivable by non-residents who operate digital businesses targeting, among others, the India market. The EL exists as a separate levy alongside the Goods and Services Tax (GST) on cross-border transactions and hence, it is an incremental cost of doing business.

Clarification was sought by various stakeholders on several aspects of the EL provisions as amended by the FA 2020. In this regard, the Finance Bill 2021 (FB 2021), which was presented on 1 February 2021 by the Finance Minister of India, proposes certain clarifications with retrospective effect from 1 April 2020.

Presently, the amendments are at the proposal stage and will become a part of the income tax law once enacted (this is expected sometime in March 2021). The amendments include:

1. Consideration, in the nature of royalty and fees for technical services (FTS), which is taxable under the Income Tax Act read with the Double Tax Avoidance Agreements, will not be subject to EL. Thus, royalty and FTS income will continue to be charged at 10% (plus applicable surcharge and cess) on a gross basis and will not be chargeable to EL.

2. The scope of the terms "online sale of goods" and "online provision of services" will cover any of the following activities if undertaken online:
    - Acceptance of an offer for sale
    - Placing a purchase order
    - Acceptance of a purchase order
    - Payment of the consideration
    - The supply of goods or provision of services, partly or wholly

This proposed amendment may broaden the applicability of the EL provisions even to physical or offline supplies of goods and services if any one of the above activities takes place online.

3. E-commerce operators are currently subject to EL at 2% on the amount of consideration "received or receivable". A clarification has now been provided through an amendment that such consideration will include:
   - Consideration from the sale of goods, irrespective of whether the e-commerce operator owns the goods
   - Consideration from the provision of services, irrespective of whether the service is provided or facilitated by the e-commerce operator

   This amendment may raise a question on the position adopted by the non-resident aggregators or intermediaries that EL liability should be restricted only to the remuneration or fees earned by them for facilitation or intermediation, and not the entire consideration received in respect of the sale of goods or provision of services.

4. Income arising from transactions subject to EL is exempt from income tax with effect from 1 April 2021. Thus, for FY 2020-21, there is a mismatch in the effective dates of the EL and the corresponding income tax exemption. It has been proposed to remove this anomaly in order to grant the income tax exemption with retrospective effect to 1 April 2020.

Since these provisions will take effect retrospectively from 1 April 2020 (once they become part of the law), it may be advisable for non-residents with business operations in India to examine and re-evaluate the implications of these changes, for example, whether changes should be made to their commercial arrangements, and to determine their compliance obligations.

Taiwan amends Transfer Pricing Regulations

In response to global transfer pricing (TP) trends and effective anti-tax avoidance measures for cross-border related party transactions, the Taiwan Ministry of Finance (MOF) issued Tai-Tsai-Shuei- Zi Ruling No. 10904654700 (the Ruling) on 28 December 2020, which amends the Regulations Governing the Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing (TP Regulations). The amended TP Regulations apply to 2020 Taiwan corporate income tax filings and future years.

The key details of the amendments are summarized below.

Detailed discussion

Updating the definition of intangible assets (Article 4 amendment)

Intangible assets are defined by the amendment as non-tangible assets and rights that can be owned or controlled for use in commercial activities and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.

Use of uncontrolled transactions as a comparable for controlled transactions (Article 7 amendment)

If a comparable uncontrolled transaction satisfies one of the following conditions, it may be used to determine a single reliable arm's-length result for the controlled transaction:

- There is no difference between the controlled transaction and the comparable uncontrolled transaction, and between a related party engaged in the controlled transaction and a non-related party engaged in the comparable uncontrolled

transaction, that has a significant impact on the open market price.
- If there are significant differences, reasonable adjustments can be made to eliminate the significant impact caused by such differences.

The economic substance of the controlled transaction (Article 8 amendment)

The amendment follows the Organisation for Economic Co-operation and Development (OECD) TP guidelines and the substance over form principle under Article 7 of the Taxpayer Rights Protection Act. When determining the comparability of a controlled transaction, an enterprise is required to base the comparability on the existence of the actual economic relationship and its economic beneficial ownership.

Evaluating the comparability of the risks born by the enterprise under a controlled transaction (Article 8-1 amendment)

The amendment follows the OECD TP guidelines to: (i) emphasize the importance of risk analysis and strengthen the analysis framework; (ii) prescribe the steps for evaluating the comparability of risk factors; (iii) evaluate the risk assumed and management functions of the participants in the controlled transactions; and (iv) allocate profit based on the level of risk assumed and management functions during the re-pricing process.

Comparability analysis of the development, enhancement, maintenance, protection and exploitation (DEMPE) activities in the valuation of intangible transactions (Article 9-2 amendment)

In addition to following the OECD Base Erosion and Profit Shifting Action Plan in determining the arm's-length nature of profit allocation for intangible transactions, a comparability analysis of the DEMPE activities is required to ensure that profit allocation is consistent with the DEMPE activity (including the functions performed, assets used, and risks assumed) and is at arm's length.

Addition of the Income-based Approach as a TP method for the valuation of intangible assets (Article 11 amendment) and corresponding regulations and considerations (Article 19-1 amendment)

The amendment includes: (i) the addition of the Income-based Approach as a TP method in evaluating the arm's-length nature of intangible asset transactions; (ii) corresponding Income-based Approach regulations; and (iii) factors to be considered when applying the approach.

Penalties for undisclosed controlled transactions (Article 34 amendment)

The penalties under Article 110 of the Income Tax Act are imposed if: (i) the profit-seeking enterprise fails to comply with the requirements to disclose its controlled transactions in its income tax return and TP documentation; and (ii) the increase in taxable income of the controlled transactions adjusted and assessed by the tax collection authorities is more than 5% of the annual taxable income of the enterprise and more than 1.5% of the annual net operating revenue.

Implications

The MOF has illustrated that research and development and marketing expenses incurred by an enterprise for the development of intangibles should be recorded as expenses rather than capitalized for financial accounting purposes.

However, from a TP perspective, the creation of an intangible asset of significant economic value can be deemed to exist (despite such intangible asset not being recorded on the balance sheet of the enterprise). Consequently, multinational companies (MNCs) should be aware of intangible assets with

significant economic value that are not capitalized in the balance sheet as these intangibles may trigger TP issues.

The Taiwan tax authorities have been increasingly focused on intangible asset related issues during recent audits and as a result of the amendments, these audits are expected to become more detailed.

As discussed above, the amendments focus on the consistency between a transaction's actual economic relationships and its related beneficial ownership to meet the arm's-length principle. From a comparability perspective, MNCs that assume and manage risks would be considered as the beneficial owners. Thus, if a transaction involves intangible assets, the comparability analysis should be conducted based on the DEMPE activities to ensure that the profit allocation aligns with each entity's contribution. If the economic substance is not taken into consideration and profit allocation is based on the legal ownership of intangibles, MNCs may be challenged by the tax authorities.

The addition of the Income-based Approach provides another alternative in settling disputes on TP issues associated with intangible assets. However, during TP audits, the tax authorities are likely to pay special attention to the assumptions made. It is recommended that MNCs maintain robust documentation in respect of the underlying assumptions when applying the Income-based Approach.

Key details of the green technology incentives

<table>
<tr><th></th><th>Green Investment Tax Allowance - Asset</th><th>Green Investment Tax Allowance - Project</th><th>Green Income Tax Exemption – Services</th><th>Green Income Tax Exemption – Solar Leasing</th></tr>
<tr><td>Incentive</td><td>100% investment tax allowance on qualifying capital expenditure incurred on approved green technology assets, between 25 October 2013 and 31 December 2023.

The allowance can be set off against 70% of the statutory income and any unutilized allowances can be carried forward to subsequent YAs until fully absorbed.</td><td>100% investment tax allowance on qualifying capital expenditure incurred on a green technology project for three years, from the date the first qualifying capital expenditure is incurred.

The allowance can be set off against 70% of the statutory income and any unutilized allowances can be carried forward to subsequent YAs until fully absorbed.</td><td>70% income tax exemption on statutory income derived from qualifying green services activities for a period of three years, from the year the first invoice relating to green technology services is issued.</td><td>70% income tax exemption on statutory income derived from solar leasing activities as follows:

<table><tr><th>Capacity</th><th>Period</th></tr><tr><td>> 3MW to ≤ 10MW</td><td>5 years</td></tr><tr><td>> 10MW to ≤ 30MW</td><td>10 years</td></tr></table></td></tr>
<tr><td>Qualifying projects / sectors</td><td>Qualifying assets in the following sectors:
‣ Energy efficiency
‣ Building
‣ Transport
‣ Renewable energy
‣ Waste
‣ Water

The assets must be registered and listed under the MyHijau Directory</td><td>Green technology projects in relation to:
‣ Renewable energy
‣ Energy efficiency
‣ Green building
‣ Green data centre
‣ Integrated waste management</td><td>Green technology services for the following sectors:
‣ Renewable energy
‣ Energy efficiency
‣ Electric vehicle
‣ Green building
‣ Green data centre
‣ Green certification and verification
‣ Green township</td><td>Renewable energy (Solar PV)</td></tr>
<tr><td rowspan="2">Key eligibility criteria</td><td colspan="4">A Malaysian-resident company which is incorporated under the Companies Act 2016</td></tr>
<tr><td>The company must submit the applications to MGTC within 2 years from the date the asset is purchased (based on supplier invoice).</td><td>A company that has incurred the first qualifying capital expenditure before its application to MIDA is <u>not</u> eligible for the incentive.</td><td>A company that has issued the first invoice before its application to MIDA is <u>not</u> eligible for the incentive.</td><td>A company that has issued the first invoice before its application to MIDA is <u>not</u> eligible for the incentive.</td></tr>
</table>

	Green Investment Tax Allowance - Asset	Green Investment Tax Allowance - Project	Green Income Tax Exemption – Services	Green Income Tax Exemption – Solar Leasing
Key eligibility criteria (cont'd)	The company must: ▸ Minimize the degradation of the environment or reduce greenhouse emission; ▸ Promote health and improvement of the environment; and ▸ Conserve the use of energy, water and/or other forms of natural resources or promote the use of renewable energy or able to recycle waste material resources	The company must: ▸ Minimize the degradation of the environment or reduce greenhouse emission; ▸ Promote health and improvement of the environment; and ▸ Conserve the use of energy, water and/or other forms of natural resources or promote the use of renewable energy or able to recycle waste material resources	The company must: ▸ Employ at least five full-time employees working in Malaysia, including at least two competent personnel (as defined) in green technology; ▸ Have a green policy related to the environment or sustainability; ▸ Have documented Standard Operating Procedures to ensure quality of services; ▸ Derive 100% income from the respective green technology services; ▸ Undertake at least three qualifying activities (as defined) from the respective green technology sectors	The company must: ▸ Employ at least five full-time employees working in Malaysia, including at least two competent personnel (as defined) in green technology; ▸ Derive its exempted income from sales of electricity or leasing activities. Income derived from activities other than the sales of electricity or leasing activities is not eligible for the income tax exemption. ▸ Incorporate its assets in the RPVI balance sheet
Application period	Applications must be submitted to MGTC by 31 December 2023	Applications must be received by MIDA between 1 January 2020 to 31 December 2023		

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Important dates

Date	Event
28 February 2021	6th month revision of tax estimates for companies with August year-end
28 February 2021	9th month revision of tax estimates for companies with May year-end
28 February 2021	Statutory deadline for filing of 2020 tax returns for companies with July year-end
15 March 2021	Due date for monthly instalments
31 March 2021	6th month revision of tax estimates for companies with September year-end
31 March 2021	9th month revision of tax estimates for companies with June year-end
31 March 2021	Statutory deadline for filing of 2020 tax returns for companies with August year-end

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