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EY Tax Alert

Vol. 24 - Issue no. 17
23 August 2021

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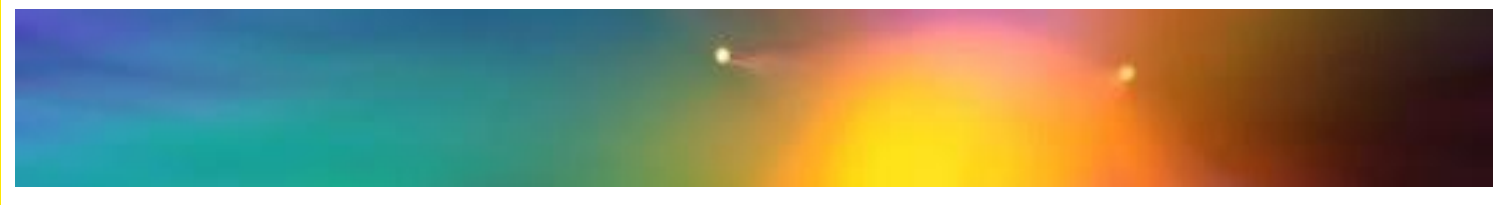
Malaysian developments

Updates to IRB's FAQs on Tax Matters during the National Recovery Plan and Return Form Filing Programme

The Inland Revenue Board (IRB) has published on its website an updated version of the document titled "Frequently Asked Questions on Tax Matters during the National Recovery Plan" (FAQs). The updated document is dated 19 August 2021.

The FAQs were updated mainly to reflect additional extensions of time (EOTs) granted for the following:

- (a) Income tax return forms for companies, limited liability partnerships (LLPs), unit trusts or property trusts, co-operative societies, trust bodies, real estate investment trusts (REITs) or property trust funds (PTFs) and business trusts with accounting periods ending between 1 November 2020 and 31 January 2021, for the year of assessment (YA) 2020 or YA 2021 (as the case may be):
 - ▶ Three-month extension from the statutory due date (previously two-month extension)

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- (b) Income tax return forms for companies, LLPs, unit trusts or property trusts, co-operative societies, trust bodies, REITs or PTFs and business trusts with accounting periods ending between 1 February 2021 and 30 April 2021, for YA 2021:
 - ▶ Two-month extension from the statutory due date
 - (c) Petroleum income tax return forms for accounting periods ending between 1 November 2020 and 31 January 2021, for YA 2020 or YA 2021 (as the case may be):
 - ▶ Three-month extension from the statutory due date (previously two-month extension)
 - (d) Petroleum income tax return forms for accounting periods ending between 1 February 2021 and 30 April 2021, for YA 2021:
 - ▶ Two-month extension from the statutory due date
 - (e) Income tax return forms for other taxpayers (i.e. individuals, resident individuals (knowledge or expert workers), non-resident individuals, non-resident individuals (knowledge or expert workers), partnerships, associations, deceased persons' estate and Hindu Joint Families), that are carrying on business, for YA 2020
 - ▶ EOT will be given until 30 September 2021 (previously 31 August 2021)

The IRB has also published on its website the Return Form (RF) Filing Programme (Amendment 4/2021) dated 19 August 2021 to reflect the above EOTs.

Stamp duty exemption on the instrument of loan or financing agreement executed between an SME and a financial institution

In February 2021, Bank Negara Malaysia (BNM) announced the establishment of a RM200 million Disaster Relief Facility (DRF) 2021 to alleviate the financial burden on small and medium enterprises (SMEs) affected by floods and to enable them to resume business operations.

Following the above, the Stamp Duty (Exemption) (No. 8) Order 2021 [P.U.(A) 333] was gazetted on 12 August 2021 to provide a stamp duty exemption on the instrument of loan or financing agreement relating to the loan or financing facility (defined below) executed between an SME and a financial institution. This exemption is not automatic and must be applied for.

The exemption shall apply to relevant instruments executed pursuant to a letter of offer issued by the financial institution between 2 February 2021 and 31 December 2021. The application for the exemption will have to be accompanied by the letter of offer, stipulating the approval of the loan or financing facility.

The following terms have been defined in the Order:

(a) Financial institution

Same meaning as that assigned to “banker” in Section 2 of the Stamp Act 1949, and any person prescribed as a financial institution by the Minister under Section 2(1) of the Central Bank of Malaysia Act 2009 (CBA) for the purposes of Section 49 of the CBA.

(b) Loan or financing facility

Means the DRF 2021 approved under BNM's Fund for SMEs

(c) SMEs

Enterprises as may be determined by the National Small and Medium Enterprises Development Council established under Section 2A of the Small and Medium Industries Development Corporation Act 1995

The Order is deemed to have come into operation on 2 February 2021.

- ▶ Clarifies and provides examples to demonstrate who constitutes a "settlor" and what constitutes "settlements" for income tax purposes
- ▶ Explains and provides examples to demonstrate circumstances where income arising from a settlement is deemed to be income of a settlor and hence assessable on him/her, pursuant to Section 65 of the Income Tax Act 1967 (ITA)
- ▶ Explains how the amount of income of a settlor from settlements is determined
- ▶ Explains and provides an example to demonstrate the tax treatment in a settlement where there are two or more settlors

Public Ruling No. 4/2021 - Taxation of Income Arising from Settlements

The IRB has published Public Ruling (PR) No. 4/2021: Taxation of Income Arising from Settlements, dated 13 August 2021. The new 18-page PR comprises the following paragraphs and sets out 20 examples:

- 1.0 Objective
- 2.0 Relevant provisions of the law
- 3.0 Interpretation
- 4.0 Introduction
- 5.0 Settlor
- 6.0 Settlements
- 7.0 Income of settlement deemed to be income of the settlors
- 8.0 Settlement creating a trust
- 9.0 Settlement cases where a trust is not created
- 10.0 Resolution of amount of any payment of income made or apportionment of income or statutory income
- 11.0 Two or more settlors to a settlement
- 12.0 Recovery of income tax paid by a settlor
- 13.0 Disclaimer

Broadly, the PR explains the taxation of income arising from a settlement created by a person for the benefit of another person. In particular, the PR:

Overseas developments

New Indonesia-Singapore tax treaty enters into force

Indonesia and Singapore signed a new tax treaty on 4 February 2020 (New Treaty). The New Treaty was ratified by Indonesia on 11 May 2021 and entered into force on 23 July 2021 after ratification by Singapore. The New Treaty will replace the existing tax treaty that has been in effect since 1992 (Current Treaty) and will take effect for most purposes on 1 January 2022.

Highlights of the New Treaty include:

- ▶ Reduction of the withholding tax rates for royalties and branch profits
- ▶ Introduction of capital gains article
- ▶ Inclusion of the principal purpose test to counter tax treaty abuse

The key changes in the New Treaty are summarized below.

Detailed discussion

Fiscal domicile (Article 4)

The New Treaty removes the exclusion of a permanent establishment of a foreign enterprise from the residency definition. It also adds a nationality test to the tie-breaker rule to determine the tax residency of an individual.

Associated enterprise (Article 9)

The New Treaty adopts provisions equivalent to the latest OECD Model Tax Convention (MTC) to govern adjustment procedures (with certain limitations).

Dividends (Article 10)

There is no change to the dividend withholding tax (WHT) rate. The branch profits tax (BPT) rate for permanent establishments is reduced from 15% to 10%. The New Treaty also clarifies that the reduced BPT rate may not affect agreed clauses under oil and gas production sharing contracts (PSCs) or other mining sector works contracts. The "most favored nation" provision for PSCs is removed from the New Treaty.

Interest (Article 11)

There is no change to the interest WHT rate. The New Treaty expands the list of government institutions which are exempt from tax in the source country to include sovereign wealth funds and their subsidiaries. The New Treaty discontinues the source country tax exemption for interest on government bonds and excludes penalty charges for late payment from the definition of interest.

Royalties (Article 12)

The New Treaty reduces the WHT rate for royalties to 8% or 10% from the Current Treaty WHT rate of 15%. The alienation of certain types of intangible assets is removed from the royalty definition.

Capital gains (Article 13)

The New Treaty introduces a capital gains provision. The provision adopts the latest approach under the OECD MTC with the following differences:

- ▶ The disposal of shares in a land-rich company may be exempt from tax in the source country if one of the following conditions is met:
 - The alienator owns less than 50% of the total issued shares being alienated.
 - The immovable property is used by the company to carry on its business.
 - The gains arise from the framework of a reorganization, merger, de-merger or similar operation.
- ▶ Indonesia has the right to tax gains on the disposal of shares in an Indonesian listed company.

Other income (Article 22)

The New Treaty adopts the "other income" provision equivalent to the United Nations MTC 2011, unlike the Current Treaty which contains a clause allocating the taxing right to both countries pursuant to their domestic laws.

Exchange of information (Article 26)

This provision reflects the latest OECD MTC provision.

Entitlement to benefits (Article 28)

The New Treaty adopts the "principal purpose test" provision to limit treaty abuse.

Limitation of relief (Article 22 under Current Treaty)

The tax treaty benefits under the Current Treaty are granted to a Singapore resident only in respect of income that is remitted to or received in Singapore. The New Treaty does not include a similar provision.

Thailand's VAT on digital services (e-services) provided by foreign operators will apply as of 1 September 2021

Initially proposed four years ago, Thailand's new Value Added Tax (VAT) rule for non-resident providers of electronic or digital services (so-called "e-services" under Thai law) to non-VAT registrants in Thailand was passed into law in February 2021 and will apply from 1 September 2021.

The rule is broadly similar in concept (taxing supplies of digital services by non-residents) to the rules introduced in Singapore (Goods and Services Tax or GST), Malaysia (Services Tax on imported digital services) and Indonesia (VAT) in 2020. However, it is important to note that the rules and how they are being in practice are different in each jurisdiction.

The principal objective of this new rule is to generate additional tax revenue and to create a level playing field for Thai-based providers of e-services.

Detailed discussion

Overview

From 1 September 2021:

- ▶ Non-Thai individuals or corporations or other persons providing e-services (see definitions below) from overseas to non-VAT registrants in Thailand may be required to register for Thai VAT (see exclusions below).
- ▶ If all customers are VAT-registered companies, foreign operators will not be directly affected.
- ▶ Individuals or non-VAT registered business entities resident in Thailand that purchase e-services from an operator overseas may see 7% Thai VAT added to invoices when billed by foreign operators.

Definitions of e-services and e-service platform operators

Examples of e-services are online games, movie and music streaming services, mobile application services, online advertising services, online software sales or licensing, web hosting or any other services that are delivered over the Internet or through another essentially automated, electronic network that could not be successfully provided if such technologies were not available.

Non-Thai e-platform operators who act as intermediaries for multiple non-Thai e-service providers are also required to register for Thai VAT, but only if they: (i) offer a complete suite of e-services, from presentation to delivery to payment collection; (ii) receive payment for e-services; and (iii) deliver the e-services on behalf of non-resident e-service providers.

If any of these three criteria is not met, an e-platform operator is not required to register for VAT purposes. This means that, for example, some online gaming platforms do not need to register as they may either not collect payment or deliver services to the end-users and therefore do not meet criterion (ii) or (iii), respectively. However, digital platform operators who do not meet all these criteria still need to consider whether they should register as non-Thai e-service providers.

Exclusions

Not every non-resident e-service provider and e-platform operator will be affected. Some e-services are excluded from this new e-service VAT rule, including telecommunications, online payment or live teaching services and sales of e-books or e-magazines. The examples given by the authorities are not exhaustive, and certain online service providers will need to seek specific advice to assess whether they are excluded.

Moreover, only those with income of more than THB1.8 million annually (approx. US\$60,000) from providing e-services to non-VAT registrant customers in Thailand will be required to register for VAT, file monthly VAT returns and pay VAT. And unlike Thai-based operators, non-resident operators are neither required to issue a tax invoice to Thai customers nor keep an input tax report.

Identifying customers

Interestingly, although this new VAT rule is aimed at collecting VAT on e-services provided by foreign businesses to consumers, the rules emphasize collection of VAT on e-services provided to non-VAT registrant customers. Some corporate customers may not be VAT registrants because they operate VAT-exempt businesses, while individual customers could be VAT registrants if their revenue from carrying out VAT business in Thailand reaches the relevant VAT threshold.

As such, it will be important for non-Thai e-service providers and e-platform operators to identify the VAT profile of their customers.

Relying on self-declaration by customers is possible, but operators should at least inquire on, and preferably check the VAT registration status of the customer. VAT registration status can be checked on the Revenue Department's website by entering the 13-digit (tax, personal or business) ID of the customer.

To determine whether a customer is purchasing an e-service for use in Thailand, operators can rely on credit card information, billing address and access information like the mobile country code or IP address.

Implementation of new VAT rule for foreign and Thai e-service providers after 1 September

One of the key drivers of this new VAT rule is to level the playing field for Thai and foreign e-service providers and e-platform operators.

	Foreign e-service providers and platform operators	Existing Thai e-service providers and platform operators
Revenue threshold	THB 1.8 million annually	THB 1.8 million annually
VAT registration process	Simplified VAT system for e-services (SVE) via Thai Revenue Department's website	Standard requirements
Tax invoices	Not required	Required
Input tax	Not recoverable	Recoverable
Input tax report	Not required	Required
Output tax report	Required	Required
VAT filing and payment	Monthly basis	Monthly basis
Permanent establishment (PE) and income tax	No income tax if there is no PE	Required
Penalties and fines for non-compliance	Fully applicable	Fully applicable

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Important dates

31 August 2021	6 th month revision of tax estimates for companies with February year-end
31 August 2021	9 th month revision of tax estimates for companies with November year-end
31 August 2021	Statutory deadline for filing of 2021 tax returns for companies with January year-end. As a concession, this deadline is extended to 30 November 2021 pursuant to the RF Filing Programme (Amendment 4/2021).
15 September 2021	Due date for monthly instalments
30 September 2021	6 th month revision of tax estimates for companies with March year-end
30 September 2021	9 th month revision of tax estimates for companies with December year-end
30 September 2021	Statutory deadline for filing of 2021 tax returns for companies with February year-end. As a concession, this deadline is extended to 30 November 2021 pursuant to the RF Filing Programme (Amendment 4/2021).

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APAC no. 07002967
ED None.

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