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Tax update

Legislative developments

On 12 January 2012, the Australian Government released Exposure Draft Regulations (Draft Regulations) to seek to amend *A New Tax System (Goods and Services Tax) Regulations 1999* (Principal Regulations). One of the significant changes proposed in the Draft Regulations seeks to limit access to partial credits (75 percent) known as reduced input tax credits (RITC) for certain acquisitions made by trust entities (including superannuation funds) that make financial supplies. The proposed Regulations will commence on 1 July 2012.

The current Regulations enable trustees to bundle costs incurred on behalf of the trust into a single 'trustee fee' for which the trust is generally entitled to claim an RITC. This essentially means that the trust can claim an RITC where it otherwise would not have been eligible had the costs been acquired directly by the trust.

Under the proposed changes, all services acquired by a 'recognised trust scheme' (provided that they are performed on or after 1 July 2012) will be entitled to RITCs under a new item. Trusts will be able to claim RITCs for acquisitions. However, this will be at a reduced RITC rate of 55 percent as opposed to 75 percent, and only if the trustee is registered for goods and services tax (GST) in its own capacity.

Importantly, the new RITC item specifically excludes the following services (subject to certain conditions):

- brokerage services
- investment portfolio management functions
- administrative functions in relation to investment funds
- custodial services
- master custody services.

This means that a trust will still be able to claim an RITC at the standard rate of 75 percent for the above acquisitions, where applicable.

On 3 February 2012, the Australian Government announced the imminent release of Tax Laws Amendment (2012 Measures No. 1) Bill 2012 (TLAB 2012). TLAB 2012 proposes to amend the consolidation tax cost setting rules as outlined in the government announcement on 25 November 2011. We discussed the government announcement released on 25 November 2011 in issue 42:

<http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/General-Tax-Update/Pages/Default.aspx>

As an update to Issue 41, on 7 March 2012 Exposure Draft (ED) legislation was released to implement the first stage of the Australian Government's proposed Investment Manager Regime (IMR). Specifically, the ED legislation includes provisions to:

- amend the tax law to prevent the Australian Taxation Office from raising assessments for certain investment income of foreign managed funds for 2010–11 and previous income years; this announcement will address a key area of investment uncertainty for US-based fund managers investing in Australia arising from the application of US accounting standard 'FIN 48'
- introduce changes to the tax treatment of certain investment income for foreign funds where those funds are taken to have a permanent establishment in Australia by virtue of the fact they have engaged an Australian-based intermediary.

Taxation rulings

On 14 December 2011, the Australian Taxation Office released draft Taxation Ruling (TR) 2011/D7 regarding the application of the Taxation of Financial Arrangements (TOFA) regime to gains and losses relating to exempt income or non-assessable non-exempt income.

Generally, under the TOFA regime, a gain made from a financial arrangement is included in an entity's assessable income and a loss made from a financial arrangement is deductible to the extent that the loss is made in gaining or producing an entity's assessable income, or necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income.

However, the tax treatment of gains and losses related to exempt income or non-assessable non-exempt income are exceptions to this general approach. TR 2011/D7 is quite comprehensive and should be considered by financial institutions that are bound by TOFA rules.

Other developments

On 11 December 2011, the Treasurer released a Business Tax Working Group (BTWG) report for public consultation. The report contains possible options to reform the tax treatment of losses and the black hole expenditure provisions, which apply to certain expenditures associated with restructuring, closing or starting a business.

The report notes that the BTWG considers there is merit in undertaking further consideration of reforms to the tax treatment of losses. The BTWG will assess the merit of any changes against other potential changes to the business tax system that have the potential to boost productivity growth.

On 15 February 2012, the Australian Treasury released a discussion paper to canvass possible implementation options for amendments to the TOFA tax hedging provisions, specifically in relation to hedge ineffectiveness and the hedging of a firm commitment, originally announced as part of the Federal Budget 2011–12.

Additionally, the paper considers the following four issues:

- interactions between the tax hedging rules and other TOFA elective tax-timing methods
- the eligibility of tax hedging treatment of financial arrangements that are economic (but not accounting) hedges entered into by managed investment funds, insurance companies and superannuation funds
- tax treatment of fair value hedges (as defined in the accounting standards) for taxpayers who do not make a TOFA fair value tax-timing election
- the time within which to comply with certain tax hedging documentation for existing hedging financial arrangements.

The discussion paper addresses each of the issues separately, with consultation questions asked in relation to each issue.

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Tax update

Value added tax (VAT) reform pilot programme

As outlined in Issue 42, Shanghai launched a VAT reform pilot programme on 1 January 2012. Under this programme, companies registered in Shanghai which engage in modern services and in the transportation business should be subject to PRC VAT from 1 January 2012 onwards, instead of business tax (BT). According to the PRC tax regulations issued by the PRC Ministry of Finance and the State Administration of Taxation on the VAT reform pilot programme, a lease of a moveable asset (including both a finance lease and operating lease) is considered as modern services, and should be subject to PRC VAT of 17 percent from 1 January 2012. In addition, companies with a finance lease of moveable assets can enjoy the VAT "levy first and refund later" policy for effective VAT burdens in excess of 3 percent on a 'net' basis. Previously, the finance lease was subject to BT of 5 percent. For details of "levy first and refund later" policy, please refer to China Alert Issue 6:

<http://kpmg.com/cn/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Documents/china-alert-1204-06.pdf>

Other financial service industries, for example banking and insurance, were not part of the VAT reform pilot programme in Shanghai.

It is expected that the VAT reform pilot programme will be expanded to Beijing, Tianjin and Chongqing in July 2012.

Deduction of bad debt provision by finance lease companies

According to a newly issued regulation, for the period from 2011 to 2013 financial institutions engaged in finance leasing are allowed to deduct bad debt provisions for PRC corporate income tax purposes. However, the deductible provision is capped at 1 percent of the risky asset, i.e. the finance lease receivable. Such deduction was not available to finance lease companies in the past.

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Tax update

Budget 2012–13

Financial Secretary Mr John Tsang Chun-wah delivered his fifth Budget speech, which is also the last Budget of the current government, to the Legislative Council on 1 February 2012. Key tax-related changes are highlighted below:

Update on Islamic finance in Hong Kong

The financial secretary announced that the Hong Kong Government is currently finalising legislative amendments to promote Islamic finance. The government intends to provide a level playing field for common types of Islamic bonds (such as Sukuk) in respect of profits tax, property tax and stamp duty in comparison to conventional financing.

Islamic financial instruments typically avoid the payment of prohibited interest by structuring returns in the form of distributions, profits or rental in respect of property. Specifically, Sukuk are structured such that interest income is replaced by a share of the rental income derived from beneficial ownership of a tangible asset.

These differences in the legal form of the transaction can result in less favourable or unexpected tax treatments. In particular:

- Whereas interest expense is generally deductible, dividends are usually paid out of post tax profits.
- Islamic finance frequently involves the transfer of assets. This can give rise to profits tax on gains, stamp duty and a recapture of capital allowances.
- An SPV is frequently needed to issue the Sukuk, which can result in extra filing obligations. If the SPV is not treated as transparent for tax purposes, or the issues outlined above are not addressed, additional tax leakage can also result.

For Hong Kong to attract Islamic financing, it will be necessary to ensure that these disadvantages are removed and that the tax treatment for Islamic financing is placed on the same footing as conventional bonds.

Further background on the tax issues affecting Islamic bonds in Hong Kong can be found in the publication below:

<http://kpmg.com/cn/en/IssuesAndInsights/ArticlesPublications/Pages/islamic-bond-hk-200903.aspx>

Proposed reduction in profits tax

The financial secretary proposed a reduction of 75 percent of the final tax for the year of assessment 2011/12 in respect of profits tax, salaries tax and tax under personal assessment, subject to a ceiling of HKD 12,000 per case. The proposed tax reduction will only be applicable to the final tax for the year of assessment 2011/12, but not to the provisional tax for the same year. Therefore, taxpayers are still required to pay their provisional tax for the year of assessment 2011/12 on time despite the proposed reduction. The provisional tax paid will be applied to pay the final tax for the year of assessment 2011/12 and provisional tax for the year of assessment 2012/13. Excess balance, if any, will be refunded.

For further details of Budget 2012–13, please refer to the link below:

<http://www.kpmg.com/cn/en/IssuesAndInsights/ArticlesPublications/Documents/Hong-Kong-budget-summary-201202-2.pdf>

Advance pricing arrangement (APA) programme

The Inland Revenue Department (IRD) announced that an advance pricing arrangement programme will be launched in April 2012.

While the APA programme will initially be limited to bilateral APAs, this still represents a significant step forward for transfer pricing in Hong Kong. It builds on Departmental Interpretation and Practice Notes (DIPN) No. 46 on transfer pricing guidelines

issued in December 2009 and the continued expansion of Hong Kong's double taxation agreement (DTA) network. The APA programme guidelines will be in a new DIPN and a draft has been issued for consultation.

An APA enables a taxpayer to agree in advance with one or more taxing authorities on the criteria for determining transfer pricing for cross-border transactions between related companies. Where the taxing authorities of two or more jurisdictions are parties to the APA (i.e. bilateral or multilateral), this can be one of the most effective methods of preventing double taxation and resolving potential transfer pricing issues with the relevant tax authorities in an upfront manner.

Against a background of the international trend of DTA partners entering into APAs, the IRD's launch of the APA programme is welcome. Across the Asia Pacific region, APAs are becoming increasingly common as Asian tax authorities become more skilful at negotiating and concluding upfront agreements. In addition, multinational companies are increasingly relying on APAs as an effective tool to manage their transfer pricing exposures. Previously, no formal APA programme existed although the IRD is understood to have entertained some requests akin to an APA under its advance ruling regime.

The IRD has actively been expanding the Hong Kong DTA network over the past two years and this provides a platform for the introduction of the APA programme in Hong Kong. It is expected that the APA programme will require an investment of significant resources from the IRD for the negotiation process and this may underpin the IRD's intention to entertain only bilateral APAs upon the programme's inception.

We acknowledge that the IRD has taken a positive step forward to facilitate the adoption of APAs. This also reflects the IRD's growing interest in fostering transfer pricing compliance within Hong Kong.

Providing taxpayers in Hong Kong with the ability to enter into APAs will further secure Hong Kong's position as the preferred destination for multinational companies to locate their regional hub, sourcing, treasury or other important operations. Most importantly, it will enable taxpayers to obtain certainty about their tax position and effectively manage their transfer pricing exposure and compliance, both in Hong Kong and in relevant counterparty jurisdictions covered by the DTA network.

As the APA process will also involve a significant investment of resources by taxpayers over an extended period of time, it is important for taxpayers to carefully identify and assess situations where an APA will form an optimal transfer pricing solution for them. The increasing use of APAs regionally and internationally reflects the significant compliance concerns taxpayers are facing in the field of transfer pricing. Many developed transfer pricing jurisdictions are actively expanding and expediting their APA programmes. In the course of time, we would expect the IRD to follow a similar path.

Deduction of share-based payments (SBP)

Hong Kong Financial Reporting Standard 2 (HKFRS 2) governs the accounting treatment of SBP and is effective for financial periods beginning on or after 1 January 2005. The introduction of HKFRS 2 has created uncertainty over the tax treatment of SBP charged to accounts.

It has been the IRD's stance that SBP recognised in respect of stock options or share award obligations fulfilled by issuing new shares are not deductible. Where the obligations are met by acquiring shares from the market, the costs incurred in the acquisition are allowable deductions when the vesting conditions of the stock option or share award have been satisfied.

Stock options or share award obligations are sometimes discharged by recharge arrangements between group companies, i.e. an employing entity is recharged for shares issued or acquired by another group entity. The issues on recharging are very controversial as the IRD and tax practitioners hold diverse views on the matter. Having revisited the issues and with a view to resolving the prolonged tax disputes, the IRD has decided to adopt the following positions for recharge arrangements with written recharge agreements:

- Recharge in relation to both the new issue of shares as well as the acquisition of shares from the market by a group entity is allowed.
- The timing of deduction is the point of exercise of a stock option or the point of vesting of a share award.
- The amount of deduction claimed must not be excessive (for example, it should not be more than the open market value of the shares acquired at the date when the stock option or share award is exercised/vested less the amount or value of consideration given by the grantee or awardee for the grant and/or exercise of the option or award, as the case may be).
- Where any option shares/award shares are subsequently forfeited or cancelled, any deduction previously allowed should be written back as a trading receipt and offered for assessment.

Source of commission income – Court of Appeal reaffirms the application of ING Baring

In *CIR v Li & Fung (Trading) Limited (CACV 86/2011)*, the Court of Appeal upheld the decision of the Court of First Instance, which found in favour of the taxpayer that the source of the commission income was outside of Hong Kong. The court again declined to follow the Commissioner of Inland Revenue's argument that the income of the taxpayer should be apportioned on the basis that the management and supervision of overseas affiliates, which were undertaken in Hong Kong, were key factors in producing the taxpayer's profits.

The Court of Appeal agreed with the decision of the Court of First Instance and noted that its conclusion was amply justified.

The Court of Appeal had regard to the submissions made by the taxpayer, which underlined the important distinction between the taxpayer managing its business in Hong Kong and its source of profits by its affiliates outside of Hong Kong. The Court of Appeal held that the taxpayer's case compares well with this description of ING Baring's activities in *ING Baring Securities (Hong Kong) Ltd v CIR*. The decision reaffirms the approach in *ING Baring*, that to determine the source of a profit, one must first identify the transaction which directly gives rise to the profit. Going forward, the IRD should now accept that the *ING Baring* decision has a wider application for the source of profits in general and it cannot be restricted to factually similar cases.

Treaty coming into effect

The DTA between Hong Kong and Spain signed on 1 April 2011 has completed its formal ratification procedures. The DTA will take effect for any year of assessment beginning on or after 16 April 2012 in Hong Kong.

For further details, please refer to Issue 40 of General Tax Update at the link below:

<http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/General-Tax-Update/Documents/General-tax-update-1108-40.pdf>

In addition, Indonesian authorities ratified the DTA between Hong Kong and Indonesia on 5 March 2012. The DTA will take effect in Indonesia from 1 January 2013 and from 1 April 2013 in Hong Kong.

For further details, please refer to Issue 8 of Tax Alert at the link below:

<http://www.kpmg.com/cn/en/IssuesAndInsights/ArticlesPublications/Newsletters/Tax-alert/Documents/tax-alert-1204-08.pdf>

The DTA was originally signed in March 2010 and the delay in ratification by the Indonesian authorities has caused considerable uncertainty for institutions making investments in Indonesia who have considered using Hong Kong as a holding jurisdiction for those investments. While the ratification of the DTA is welcomed, there remains one outstanding technical issue relating to the application of the dividend article in the DTA. Due to Hong Kong's tax treatment of foreign sourced dividends, Hong Kong companies are arguably not entitled to a reduction of withholding tax rates on dividends from Indonesia under the DTA based on the current wording of the DTA. KPMG understands that the IRD has raised this issue with its Indonesian counterparts but has yet to receive a response.

India

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Tax update

Transfer of shares of a foreign company that indirectly holds underlying Indian assets is not taxable

- In the case of *Vodafone International Holdings BV (2012) 204 Taxman 408 (SC)*, the Supreme Court (SC) held that the transfer of shares of a non-resident company [CGP (Holdings) Limited] with controlling interests in an Indian company (Hutchison Essar Limited), from a non-resident company (Hutchinson Telecommunications International Limited) to another non-resident company (Vodafone International Holdings BV), did not result in the transfer of a capital asset situated in India. The gains from such transfer would not be subject to Indian tax.
- In February 2007, the taxpayer, a Dutch entity, acquired 100 percent of shares in CGP (Holdings) Limited (CGP), a Cayman Islands company, from Hutchinson Telecommunications International Limited (HTIL) for USD 11.1 billion. CGP, through various intermediate companies/contractual arrangements controlled 67 percent of Hutchison Essar Limited (HEL), an Indian company, that also resulted in Vodafone acquiring control over HEL.
- In September 2007, the Tax department issued a show-cause notice to Vodafone requesting an explanation on why tax was not withheld on payments made to HTIL in relation to the above transaction. The Tax department contended that the transaction of the transfer of shares in CGP had the effect of an indirect transfer of assets situated in India.
- Vodafone then filed a writ petition in the High Court of Bombay, inter alia challenging the jurisdiction of the tax authorities in the matter. The High Court of Bombay held that the tax authorities had made out a prima facie case that the transaction was a transfer of capital asset situated in India, and accordingly, the Indian income tax authorities had jurisdiction over the matter.
- Vodafone then filed a special leave petition (SLP) against the High Court of Bombay order before the SC. On 26 November 2010, the SLP was admitted and the SC finally concluded that the Indian Income Tax Act does not have 'look through' provisions and it cannot be extended to cover indirect transfers of capital assets/property situated in India. The purpose of the Cayman Island company was not only to hold shares in subsidiary companies but also to enable a smooth transition of business. The present transaction was a 'share sale' but not an 'asset sale' and concerned the sale of an entire investment. In essence, the character of the transaction was an alienation of shares. The parties had agreed on a lump sum consideration and there was no question regarding the allocation of such consideration for the transfer of any other rights or entitlements.

The withholding tax provisions under the act will not apply when there is an offshore transaction between two non-residents. Accordingly, such provisions would not have an extraterritorial operation. The SC also observed that the inclusion of an anti-abuse provision under the statute/tax treaty is a matter of national economic policy and, in the absence of the same, it cannot be implied.

The SC finally held that the transfer of the shares in CGP (which was not situated in India) did not result in the transfer of a capital asset situated in India, and thus the gains from this transfer would not be subject to Indian tax. Against this SC judgement, Revenue filed a petition for a review of the judgement, which was recently dismissed by the SC.

The Union Budget for 2012–13 was presented by the finance minister in parliament on 16 March 2012

We have highlighted the key budget proposals relevant to non-resident investors below:

- There has been no change in corporate tax rates.
- If a dividend distributed by a subsidiary company has been subjected to dividend distribution tax (DDT), there will be no further DDT in the hands of the holding company while further distributing the said dividend in the same year.
- The scope of income in India deemed to be accrued or to arise for non-residents directly or indirectly through the transfer of a capital asset situated in India expanded retrospectively from 1 April 1962 to tax the indirect transfer of shares in an

Indian company. The expression “through” is clarified to always mean ‘by means of’, ‘in consequence of’ or ‘by reason of’. The share or interest in an overseas company or entity is clarified to be situated in India if it directly or indirectly derives substantial value from assets located in India. The term “property” is clarified to include rights in or in relation to an Indian company, including rights of management or control or any other such rights. The ambit of “transfer” in such cases widened to include disposition of share of companies registered/incorporated outside India where it relates to such ‘property’.

- A validation clause has been introduced with respect to demands raised for non-residents under the above retrospective provisions to protect against any question that tax was not chargeable on such transactions and which shall operate notwithstanding any judgement, decree or order of any court, tribunal or authority.
- The scope of withholding tax obligation on payment made to non-residents extended to all persons including non-residents, irrespective of them having a residence, place of business, business connection or any other presence in India.
- Any term used in a tax treaty not defined therein or in the domestic income tax provisions, is to have the same meaning assigned to it through any notification and will take effect from the date of the enforcement of the tax treaty.
- Although obtaining a tax residency certificate (TRC) is required, it may not be regarded as sufficient evidence for claiming tax treaty benefits.
- Effective 1 July 2012, payment to non-residents by specified persons or in specified cases (to be notified) requires an application to be made to the tax officer for determining withholding tax, irrespective of whether such payment is taxable in India or not.
- The time limit for issuing a notice in the case of a person who is treated as an agent of a non-resident has been extended from two years to six years and it would also apply to the 2011–12 fiscal year or any years before that period.
- Securities transaction tax (STT) was reduced from 0.125 percent to 0.100 percent on delivery-based transactions.
- Liability to pay advance tax was introduced even if the income is subject to withholding tax and no tax has been withheld by the payer.
- The due date for filing a return of income has been extended to 30 November, even for non-corporate taxpayers who are required to furnish a transfer pricing report.
- Detailed General Anti-avoidance Rule (GAAR) provisions were introduced. GAAR provisions were proposed to be introduced ahead of the Direct Tax Code to curb sophisticated tax avoidance and provide for declaring any arrangement as ‘impermissible avoidance arrangement’ if the main purpose of the arrangement is to obtain tax benefits and it satisfies prescribed conditions such as disproportionate rights or obligations, any misuse or abuse of domestic tax provisions, lack of commercial substance or non-bona fide business purposes.
- The government will table a white paper on unaccounted money in this parliament session.
- The Direct Tax Code is to be enacted expeditiously, taking into account the Report of the Parliamentary Standing Committee.
- For further details on India’s Budget 2012, please refer to the link below:

http://kpmg.com/MU/en/IssuesAndInsights/ArticlesPublications/Documents/KPMG_Navigating_economic_challenges_Budget2012.pdf

KPMG’s comment

- The proposed changes announced in the Indian Union Budget have attracted considerable criticism and caused uncertainty for foreign investors with existing investments in India and for those investors contemplating investing in India.
- In response to this criticism, India’s finance minister announced certain changes and that the application of the new GAAR will be delayed by one year until 2013–14.

KPMG welcomes the response from the finance minister, but notes that there are still considerable areas of uncertainty that need to be resolved.

Japan

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Tax update

Introduction of Japanese earnings stripping rules

A new measure to restrict interest deductions for certain companies has been proposed to prevent tax avoidance by companies which pay an amount of interest to Related Persons which is disproportionate to their income.

When a company's Net Interest Payments to Related Persons exceed 50 percent of Adjusted Taxable Income, the portion exceeding 50 percent will be disallowed for tax purposes.

The definitions/scope of the relevant terms are as follows:

Adjusted Taxable Income	<p>Taxable income for the fiscal year</p> <p>+ Net Interest Payments to Related Persons</p> <p>+ Depreciation, etc.</p> <p>+ Tax-exempt dividends, etc.</p> <p>± Extraordinary profits/losses (e.g. bad debt losses)</p>
Related Person	<p>(i) a person who has a 50 percent or more direct/indirect relationship with the company</p> <p>(ii) a person who controls the company or who is controlled by the company in substance, or</p> <p>(iii) a third party who receives a guarantee from a company satisfying (i) or (ii) above</p>
Net Interest Payments to Related Persons	$\text{Interest Payments to Related Persons} - \text{Interest Income relating to Interest Payments to Related Persons}$
Interest Payments	Payments of interest, interest equivalents (e.g. the interest portion of lease fees) and guarantee fees, etc. paid on debt guaranteed by Related Persons
Interest Payments to Related Persons	<p>Interest Payments to Related Persons do not include the following:</p> <p>(i) interest payments under a repo transaction, etc. where the bonds borrowed under another repo transaction are lent</p> <p>(ii) interest payments that are subject to Japanese corporation tax in the hands of the recipient</p>
Interest Income	Interest and interest equivalents (e.g. the interest portion of lease fees) received
Interest Income relating to Interest Payments to Related Persons	$\text{Total Interest Income} \times \frac{\text{Interest Payments to Related Persons}}{\text{Total Interest Payments}}$ <p>Where there are interest payments under a repo transaction, etc. where the bonds borrowed under another repo transaction are lent:</p> <ul style="list-style-type: none"> Total Interest Income should be reduced by the amount equivalent to such interest payments.

	<ul style="list-style-type: none"> the amount equivalent to such interest payments should be excluded from Total Interest Payments. <p>With respect to Interest Income from Domestic Related Persons:</p> <ul style="list-style-type: none"> In principle, such income should not be included in Total Interest Income. However, if a Domestic Related Person receives interest from unrelated persons or non-resident individuals/foreign companies without a permanent establishment in Japan, such interest income may be included in Total Interest Income to the extent of Interest Income from Domestic Related Persons.
Domestic Related Person	A Domestic Related Person is a Related Person who is a Japanese resident individual/Japanese company or a non-resident individual/foreign company with a permanent establishment in Japan.

Increase in the consumption tax rate

In order to ensure stable revenue for the social security system and to restore sound public finances, the current consumption tax rate of 5 percent is proposed to be increased in two steps as follows:

From 1 April 2014	By 8 percent
From 1 October 2015	By 10 percent

(The new rates will be applied to taxable transactions conducted on or after the above dates, and certain transitional measures will be prepared.)

Note that the above tax rate increases may be suspended following comprehensive consideration of the economic environment prior to implementation, and this will be provided for in the amended tax law.

Amendments to preferential tax treatment for small and medium-sized business operators

The current tax law includes certain preferential tax treatment for small and medium-sized business operators to mitigate their administrative burden. Such provisions will be amended to prevent taxpayers from using this treatment improperly and ensure the reliability of the consumption tax system.

Tax-exempt status for newly established companies

Under the current tax law, a newly established company with paid-in capital of less than JPY 10 million is generally not treated as a consumption taxpayer for the first two years, except in certain cases (e.g. where the company elects for taxpayer status). According to the proposal, if a business operator (either an individual or a company) whose taxable sales exceed JPY 500 million establishes a company over which it has control(*), the new company will be treated as a taxpayer for the first two years regardless of the amount of its paid-in capital.

The amendment will apply to companies established on or after 1 April 2014.

(*) Where a business operator and its related individuals/companies directly or indirectly hold more than 50 percent of a company, the company is treated as being controlled by the business operator.

• Simplified calculation method

Under the simplified calculation method, the amount of creditable consumption tax for a taxpayer is calculated by multiplying the amount of consumption tax received on its domestic taxable sales by a deemed purchase ratio, which is predetermined depending on the type of business. A taxpayer whose taxable sales in the year before last were JPY 50 million or less may elect to apply for this method.

Based on recent research, the tax authorities now believe that the deemed purchase ratios for certain types of businesses greatly exceed the actual purchase ratios, and therefore the deemed purchase ratios will be reviewed pursuant to further research.

Korea

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Tax update

Valuation of monetary assets/liabilities denominated in a foreign currency

Under the Presidential Decree of Corporate Income Tax Act, monetary assets/liabilities denominated in a foreign currency held by financial companies need to be evaluated in accordance with the standard exchange rate or the arbitrated exchange rate as at the last day of the relevant business year. Also, financial companies can choose to evaluate currency forwards and currency swaps by applying either the exchange rate at the contract date or at the balance sheet date.

Under the amended Presidential Decree of Corporate Income Tax Act, foreign exchange risk insurance shall be evaluated in the same manner as that of a currency forward and a currency swap.

This amendment is effective from the fiscal year starting after 1 January 2012.

Provision of levying penalties on the unbinding of providing financial information requested by a financial company

Pursuant to a tax treaty, if the competent authority of the contracting state requests the financial information specified in Articles 2 & 3 of the Law of Real Name Financial Transactions and Guarantee of Secrecy on residents, domestic companies, non-residents, or foreign corporations, pursuant to the Law for the Coordination of International Tax Affairs (LCITA), the commissioner of the National Tax Service may request a specific branch of a financial institution to provide the requested financial information, and staff of the financial institution shall not refuse to comply with such request. Any person who violates the aforementioned law shall be fined not exceeding KRW 30 million.

This new provision of law is effective for financial information requests made from 31 December 2011 onwards.

Malaysia

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Tax update

Finance Act 2012

The Finance Act 2012 which incorporates some of the income tax proposals from the 2012 Budget has been gazetted. The proposals that have been excluded in the Finance Act 2012 are as follows:

- The director general of Inland Revenue (DGIR) is empowered to have access to computerised data stored in a computer including being provided with the necessary password, encryption code, decryption code, software or hardware.
- The DGIR is given the power to disregard information or particulars produced after the time specified in a notice issued by the DGIR and such disregarded information or particulars shall not be used to dispute a tax assessment issued by the DGIR in an appeal proceeding.

For further information regarding the 2012 Budget proposals, please refer to Issue 42.

<http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/taxnewsflash/Documents/aspac-mar7-2012.pdf>

Tax treatment on losses incurred by the International Currency Business Units (ICBU)

The income derived from the Islamic banking and takaful businesses conducted in any currency other than Malaysian ringgit by an approved ICBU set up within the Islamic bank or takaful company is eligible for full tax exemption. The tax exemption is effective from year of assessment (YA) 2007 to YA 2016.

The Minister of Finance (MOF) recently clarified that the losses suffered by ICBU operations during the tax exemption periods can be set off against the other taxable income of the respective banks and the takaful company.

Tax treatment on collective assessment provision arising from the adoption of FRS 139

Based on the Guidelines on the Income Tax Treatment from Adopting FRS 139 – Financial Instruments: Recognition and Measurement (FRS 139 Tax Guidelines) issued by the MOF on 1 April 2008, impairment loss provisions made based on the individual and collective assessment arising from the adoption of FRS 139 will be allowed a tax deduction. However, the Malaysian Inland Revenue Board (MIRB) has subsequently objected to the tax deduction accorded to collective assessment provision. In view of this, the MOF later clarified that banks are eligible to claim a tax deduction on the collective assessment provision. Banks with a December year end are eligible to claim the tax deduction for YA 2010, whilst banks which do not have a December year end can claim the tax deduction for YA 2011. This is provided that the banks have computed the collective assessment provision based on the method or formula prescribed by Bank Negara Malaysia, which is in line with the FRS 139 Tax Guidelines. For the subsequent YA, the MOF will reassess the issue and tax treatment on the collective impairment provision. No further clarification and decision has been issued by the MOF to date.

Statement of monetary and non-monetary incentive payment to agents, dealers or distributors (Form CP58)

The MIRB has issued a new prescribed form, Form CP58, to report monetary and non-monetary incentive payment to agents, dealers or distributors. Companies are required to provide each of their agents, dealers or distributors with a copy of the said form with the following information:

- the payer company's particulars
- the recipient's particulars
- the particulars of the incentive payment in terms of:
 - value of monetary incentives (e.g. commission/bonus/others)
 - value of non-monetary incentives (e.g. provision of vehicle/house/tour/travel package/others).

The prescribed form shall be provided to the agents, dealers or distributors by 31 March of the following year. The MIRB has, however, granted a time extension until 31 May 2012, for payer companies to complete Form CP58 in respect of payment made

Recent Income Tax rules gazetted

Income Tax (deduction for expenditure on issuance of Islamic securities) Rules 2011

The Rules to effect the proposal in the Budget 2012 to allow a tax deduction on expenses incurred in the issuance of Islamic securities pursuant to the principle of Wakalah, comprising a mixed component of debt and asset have been gazetted. The deduction is given provided the issuance of such securities is approved by the Securities Commission (SC) or the Labuan Financial Services Authority.

The Rules are effective from YA 2012 to YA 2015.

Recent Exemption Orders gazetted

Income Tax (Exemption) (No. 10) Order 2011 and Income Tax (Exemption) (No. 11) Order 2011

The Orders to effect the proposals in the Budget 2012 to extend the income tax exemption on the following items for another 3 years i.e. YA 2012 to YA 2014 have been gazetted:

- fees earned by qualified institutions in undertaking activities related to the arranging, underwriting and distributing of non-ringgit sukuk that originates from Malaysia and is issued or guaranteed by the Government of Malaysia or approved by the SC; and
- profits received by qualified institutions from the trading of non-ringgit sukuk that originates from Malaysia and is issued or guaranteed by the Government of Malaysia or approved by the SC.

Stamp Duty (Exemption) (No. 3) Order 2011

Stamp Duty (Exemption) (No. 4) Order 2011

Stamp Duty (Exemption) (No. 5) Order 2011

The Orders to effect the proposals in the Budget 2012 to provide a stamp duty exemption on the following instruments have been gazetted:

- Any loan agreements executed relating to the purchase of residential properties costing not more than RM300,000, under the Skim Perumahan Rakyat 1Malaysia for sale and purchase agreements executed between 1 January 2012 and 31 December 2016.
- A loan agreement entered into between a borrower with a bank or financial institution for a loan not exceeding RM50,000 under the Micro Financing Scheme executed on or after 1 January 2012.
- All loan or financing instruments entered into between a borrower and Bank Simpanan Nasional for a loan not exceeding RM50,000 under the Professional Services Fund executed on or after 1 January 2012.

Public Rulings

The MIRB has recently issued amongst others, the following Public Rulings:

Public Ruling No. 10/2011: Gratuity

The Public Ruling explains the method used to characterise lump sum payments received by employees upon the termination of their employment as gratuity and the tax treatment of gratuity.

The Public Ruling is effective from YA 2011.

Public Ruling No. 11/2011: bilateral credit and unilateral credit

The Public Ruling explains the bilateral credit and unilateral credit that may be claimed by a person who has been charged to tax on the same income in Malaysia and in another country.

The Public Ruling is effective from YA 2011.

Public Ruling No. 12/2011: tax exemption on employment income of non-citizen individuals working for certain companies in Malaysia

The Public Ruling explains the tax treatment of employment income derived by non-citizen individuals working for an Operational Headquarters Company, Regional Office, International Procurement Centre Company or Regional Distribution Centre Company in Malaysia.

The Public Ruling is effective from YA 2011.

Public Ruling No. 1/2012: compensation for loss of employment

The Public Ruling explains the characterisation of lump sum payments received by employees upon the termination of their employment as compensation for loss of employment and the tax treatment of compensation for loss of employment.

The Public Ruling is effective from YA 2012.

The full Public Rulings are available at <http://www.hasil.gov.my/>.

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Tax update

Enactment of the Finance Act 2011

Further to the enactment of the Finance Act 2011 last December, the main changes relevant to financial institutions are:

Income tax

As from YA 2013, a Protected Cell Company (PCC) may elect to file a separate tax return for each of its cells. Each cell shall therefore be treated as a company separate from the other cells for income tax purposes. Where a cell is unable to meet its tax liability, the director general shall have recourse to both cellular assets and non-cellular assets to recover the income tax due. This change is applicable to all PCCs with financial years ending after 30 June 2012.

Companies will calculate their Corporate Social Responsibility (CSR) Fund at 2 percent of the prior year's chargeable income instead of book profit with respect to their financial year ending after 30 June 2012 (i.e. as from YA 2013). This measure will correct some anomalies, e.g. dividend income from local companies being subject to CSR more than once.

Global Business License 1 (GBL1) companies are required to file their annual tax returns electronically. They may also file their annual returns and quarterly tax returns and pay their tax in their reporting currency if that currency is either the US dollar (USD), euro, GB pound sterling (GBP), SA rand (ZAR), Singapore dollar (SGD) or Swiss franc (CHF). This facility may be extended to other currencies provided approval is obtained from the director general.

Domestic companies including banks which are allowed to prepare their financial statements in USD, euro, GBP, ZAR, SGD or CHF may file their tax returns and pay tax in their reporting currency. This measure brings these domestic companies on a par with GBL1 companies.

As from YA 2013 (i.e. with respect to financial years ending after 30 June 2012), a company is not required to file quarterly advance payment system (APS) returns if its gross income for the prior accounting period was below MUR 2 million or it did not have chargeable income.

A new penalty is applicable where a company has opted to file quarterly APS returns based on actual results (i.e. Method B) and the income tax calculated in annual return exceeds tax actually paid under APS by more than 35 percent of the annual tax calculated. The penalty shall be 25 percent of the excess tax over the 35 percent threshold.

Effective from YA 2013 (i.e. with respect to financial years ending after 30 June 2012), banks may claim irrecoverable loans due from small and medium enterprises as a deductible expense.

A distribution to a beneficiary of a trust shall be treated as a dividend to the beneficiary thus clarifying the tax treatment of distributions by a trust. Distributions from resident trusts, being local dividends, shall be exempt in the hands of the beneficiaries.

As from 1 March 2012, interest on deposits with financial institutions shall no longer be subject to Tax Deduction at Source (TDS). However, interest payments to non-residents by companies shall henceforth be subject to TDS.

Only TDS on interest and royalties payable to non-residents are treated as final tax. In the case of other payments subject to TDS, recipients still have to file an annual tax return. The law provides for penalties and the issue of assessments in cases of non-compliance.

Solidarity income tax on exempt income (includes dividend from local companies) derived by individuals was removed with effect from 1 January 2012.

Tax on capital gains

Tax on capital gains on the disposal of immovable property was removed with effect from 5 November 2011.

Temporary schemes

New temporary schemes have been introduced, effective from 1 January 2012 to 30 June 2012, with the objective of:

- clearing outstanding debts prior to 2006 in the Mauritius Revenue Authority books
- providing incentives to taxpayers to regularise their affairs with respect to VAT, income tax, gaming, betting duties and outstanding taxes.

Under these schemes, the taxpayer has the possibility of:

- obtaining a waiver of up to 100 percent of penalties and interest payable on tax due by individuals and companies
- regularising their VAT situation by being granted major concessions in respect of their tax liabilities prior to registration (i.e. a full waiver of penalties and interest accruing until 30 June 2012)
- applying for a review of an assessment when they were originally unable to dispute a tax claimed in an assessment issued prior to 1 January 2011 under the Income Tax Act, VAT Act or Gaming Regulatory Authority Act
- decreasing their total liability by the amount of the penalties and interest accrued in case of an assessment having been maintained due to failure to pay 30 percent of tax assessed on objection, non-production of full records or non-attendance, or for one reason or another not having objected to the assessment
- making a voluntary disclosure of income which they have not declared or under-declared in the past and regularising their situation.

Value added tax

As from 1 October 2012, all VAT registered persons are required to issue a VAT invoice upon making a taxable supply, irrespective of whether the client is VAT registered or not.

The VAT invoice should indicate whether the invoice amount is inclusive or exclusive of VAT. Where the purchaser is a VAT registered person, his/her business registration number should be indicated on the VAT invoice.

A clawback of proportionate input VAT on immovable property shall not be applicable where a business is transferred as a going concern and involves a transfer of the immovable property.

As from 15 January 2012, messages sent by an operator through MMS or SMS are subject to a levy of MUR 10 cents per message.

As from 1 July 2012, a taxpayer filing their VAT return electronically shall also be required to disclose a summary of the value of supplies made to any person, other than a final consumer.

Diplomatic missions and agents shall be exempt from payment of VAT upon production of a VAT Exemption Card jointly issued by the director general and the secretary of Foreign Affairs, subject to conditions attached to the VAT Exemption Card.



Tax update

Regulations prescribing new income tax forms for income tax filing

The Bureau of Internal Revenue (BIR) issued Revenue Regulations No. 19-2011 dated 9 December 2011 prescribing new income tax forms that will be used for income tax filing covering and starting with the 2011 calendar year. The regulations modified BIR Form Nos. 1700, 1701 and 1702 to reflect the changes in information requested and to make the said forms readable by an optical character reader.

All taxpayers are required to file their income tax returns, and those not required to file but who nevertheless opt to do so should use the following revised forms starting from the 2011 calendar year:

- BIR Form No. 1700 (Annual Income Tax Return for Individuals Earning Purely Compensation Income)
- BIR Form No. 1701 (Annual Income Tax Return for Self-employed Individuals, Estates and Trusts)
- BIR Form No. 1702 (Annual Income Tax Return for Corporation, Partnership and Other Non-Individual Taxpayer).

All juridical entities following the fiscal year of reporting are required to use the new BIR Form No. 1702 starting from the fiscal year ending 31 January 2012.

Revenue Memorandum Circular No. 10-2012 dated 27 February 2012

Revenue Memorandum Circular No. 10-2012 dated 27 February 2012 provides the transitional procedures for all electronic filing/payment system (eFPS) filers using the enhanced BIR Forms. This circular states that the enhanced BIR forms are already available in all revenue district offices (RDO) and large taxpayers offices (LT), and the downloadable interactive income tax forms are available on the BIR website. However, eFPS versions of these forms are still in the testing stage.

The following workaround procedures shall be adopted by all eFPS filers, until the enhanced BIR forms are available in eFPS:

- eFPS filers are required to use and manually file the revised income tax forms, with the corresponding payment to any authorised agent bank (AAB) located within the territorial jurisdiction of the RDO/LT where the taxpayer is registered.
In cases where there are no payment returns, the taxpayer shall file the abovementioned tax forms with the RDO/LT where they are registered.
- eFPS filers are required to manually encode the contents of the return previously filed once the enhanced forms are available in the eFPS, so that if:
 - enhanced forms are available on or before the deadline, eFPS filers shall encode the contents of the return on or before 16 April 2012
 - enhanced forms are available after the deadline of 16 April 2012, eFPS filers shall encode the contents of the return within 10 days of the date of announcement of the eFPS availability via the BIR website.
- E-payment shall no longer be required if the tax due on the e-filed return is equal to the amount previously paid. However, if the tax due on the e-filed return is greater than the amount previously paid, the taxpayer shall pay the unpaid amount via electronic means, subject to applicable penalties in case e-filing is made after the due date for the payment of income tax due.

BIR Ruling No. 479-2011 dated 5 December 2011

The BIR issued BIR Ruling No. 479-2011 dated 5 December 2011 denying the following requests of the taxpayer for lack of legal or codal (tax code) basis:

- The liquidating corporation is not liable to income tax either on its transfer of the properties to its stockholder as a liquidating dividend or in its receipt of the surrendered shares of the stockholder.

- No documentary stamp tax (DST) is due on the surrender and cancellation of the liquidating corporation's shares.
- No DST is due on the transfer of the properties from the liquidating corporation to its stockholder.
- The stockholder shall realise gains or losses from the transfer of properties by way of liquidating dividends.

The BIR reversed and set aside the previously issued BIR Ruling No. 039-02 cited in the taxpayer's request and the BIR Rulings cited therein.

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Tax update

Budget 2012

This year's Budget statement, read out in parliament on 17 February 2012 by Deputy Prime Minister and Minister for Finance Mr Tharman Shanmugaratnam, was titled a 'Budget for the future'. Below are the relevant highlights of the Budget 2012:

Liberalisation of cash distribution requirement for real estate investment trust (REITs)

A REIT is defined in the Singapore Income Tax Act (SITA) as a trust constituted as a collective investment scheme authorised under Section 206 of the Securities and Futures Act (Cap. 289) and listed on the Singapore Exchange which invests or proposes to invest in immovable properties and immovable property-related assets.

Currently, a REIT would not be assessed for tax on its taxable income provided that at least 90 percent of this taxable income is distributed to its unitholders in the same financial year in which the income is derived and such distribution must be made fully in cash.

It is proposed in Budget 2012 that a REIT that makes distributions to unitholders in the form of units can continue to enjoy tax transparency. This is subject to the following conditions:

- Before the distribution, the trustee of the REIT grants the unit holders the option to receive the distributions either in cash or units in that REIT.
- On the date of distribution, the trustee of the REIT must have sufficient cash to make the entire distribution in cash as if no option had been given to those unit holders to receive the distribution in units in that REIT.

Unit holders that elect to receive distributions in units will be taxed in the same manner as if they had received the distribution in cash.

This change will take effect for distributions made on or after 1 April 2012.

Enhancement of the liberalised withholding tax exemption regime for specified entities

The current broad-based withholding tax exemption scheme is enhanced by including payments relating to any loan or indebtedness that are made by banks, finance companies and certain approved entities to permanent establishments (PE) in Singapore on or after 17 February 2012.

Extension of withholding tax exemption for over-the-counter (OTC) financial derivatives payments

The withholding tax exemption on all payments made by a financial institution to a person that is neither a Singapore resident nor a PE in Singapore on OTC financial derivatives will be extended to 31 March 2021.

Extension of tax deduction for collective impairment provisions

Currently, banks, merchant banks and finance companies may claim a tax deduction for collective impairment losses under MAS Notice 612, 1005 and 811 respectively, subject to the provisions of Section 14I of the SITA. These tax concessions will be extended for three more years until YA 2016 or YA 2017 (depending on the financial year end of the taxpayer).

Enhancement of designated investment and specified income lists

The lists of specified income and designated investments for existing tax incentives such as the Enhanced Tier Tax Incentives for funds and the Financial Sector Incentive have been revised to keep up with industry developments.

The list of designated investments will be streamlined and expanded to include private trusts that invest wholly in

The list of specified income will be revised into an exclusion list. Unless specifically excluded, all income derived on or after 17 February 2012 from designated investments by the qualifying entities would qualify for tax exemption under the relevant tax incentive scheme.

Tax certainty on gains on disposals of equity investments

In order to enhance Singapore's attractiveness as a holding company or headquarter location, upfront certainty on the tax treatment on gains derived from the disposal of equity investments by companies will be provided. Such gains will not be taxed if:

- the divesting company holds a minimum shareholding of 20 percent in the company whose shares are being disposed of
- the divesting company maintains the minimum 20 percent shareholding for a minimum period of 24 months just prior to the disposal.

For share disposals in other scenarios, the tax treatment of the gains/losses arising from share disposals will continue to be determined based on the consideration of facts and circumstances. This change will take effect for companies' disposal of shares on or after 1 June 2012. The scheme will be reviewed after five years.

The extent to which restrictions would be applied to the rules for certain types of industries or companies remains to be seen, with the obvious candidates being property developers and companies in the business of making investments (commonly referred to as Section 10E companies).

Further details will be released by the authority by 1 June 2012.

For more details on the Budget 2012, please refer to our publication Singapore Budget 2012:

<http://www.kpmg.com.sg/budget/SingaporeBudget2012.pdf>



Tax update

Inclusion of insurance agent and representative company within the insurance industry

In January 2012, the MOF issued a tax ruling (Tai-Cai-Shui #10000614270) which broadens the definition of insurance-related businesses to include insurance brokerage firms and insurance agencies.

In practice, commission and brokerage fees paid to insurance agents and brokers are considered as administrative fees for the insurance companies and are reflected as part of the insurance premium charged to the policyholders. Under the principal of taxation equality, fees received by the insurance brokerage firms and insurance agencies should get the same business tax treatment as premium revenue received by an insurance company. However, based on a ruling issued in 1965 (Tai Cai Shui #7547901), insurance brokerage firms and insurance agencies in Taiwan had not been classified as insurance industries, and were subject to 5 percent VAT, instead of gross business receipt tax (GBRT) at 2 percent for other insurance companies.

To address this issue, on 2 January 2012 the MOF issued the ruling (made retroactively effective on 1 January 2012) and announced that insurance brokerage firms and insurance agencies, which provide sales and marketing services, are now considered as one of the insurance-related industries recognised by the Taiwan Financial Supervisory Commission. Accordingly, they would be treated as GBRT taxpayers for Taiwan business tax purposes and subject to business tax at a rate of 2 percent for the insurance brokerage and agency services provided.

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