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General tax update for financial institutions in Asia Pacific

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Australia

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Tax update

Legislative developments

- On 29 June 2012, the Tax Laws Amendment (2012 Measures No. 2) Act 2012 (TLAA2) received Royal Assent.

  TLAA2 includes the Australian government's proposed changes to the operation of the rights to future income (RTFI) rules, consolidation tax cost setting rules and interaction with the operation of the taxation of financial arrangements (TOFA) rules for consolidated groups.

  TLAA2 includes amendments to modify the RTFI and tax cost setting rules to make the tax outcomes for consolidated groups more consistent with the tax outcomes that arise when assets are acquired outside the consolidation regime.

  These changes could have a significant impact on financial institutions. We encourage any taxpayer that is part of an Australian tax consolidated group to seek advice on how TLAA2 may impact their business.

  In this regard, the Australian Taxation Office is writing to affected taxpayers to recommend they review the impact of this legislation on their consolidated groups.

- On 29 June 2012, *Tax Laws Amendment (Managed Investment Trust Withholding Tax) Act 2012 (MIT WHT Act)* received Royal Assent, becoming Act No. 97 of 2012.

  The MIT WHT Act increases the Managed Investment Trust (MIT) final withholding tax from 7.5% to 15% on income distributed by MITs to non-residents in exchange for information countries made available in relation to income for years commencing on or after 1 July 2012.

  The MIT WHT Act is in accordance with the Federal Budget 2012-13 announced on 8 May 2012 and is a key measure targeting infrastructure financing in Australia by non-residents. The amendments were effective 1 July 2012 and significantly impact on returns for non-resident investors receiving fund payments (which broadly excludes dividends, interest or royalties) from investments in widely held trusts. This measure increases the required pre-tax return on capital required by foreign investors to address the higher tax rate and raises concerns over the long term stability of cash flow of projects.

- On 16 August 2012, the Treasury released an exposure draft (ED) of legislation for the proposal to introduce a concessionary 10% final withholding tax rate (rather than the 15% final withholding tax rate abovementioned) for MITs that only hold newly constructed energy efficient commercial buildings.

  The concession will be available in relation to office buildings that have obtained a five-star Green Star rating or a predicted 5.5 star National Australian Built Environmental Ratings Scheme rating, and retail centres and non-residential accommodation that meet equivalent standards. The new regime will apply where construction of the building commences on or after 1 July 2012.

- On 17 August 2012, the Treasury released an ED of proposed legislative amendments impacting refunds of overpaid goods and services tax (GST).

  The amendments are intended to apply in calculating net amounts for tax periods commencing on or after the announcement date. For monthly taxpayers this generally means they will take effect from 1 September 2012, and from 1 October 2012 for quarterly taxpayers. If introduced in its current form, the ED will significantly reduce the ability of taxpayers to obtain refunds for overpaid GST.

Summary of ED

Currently, when GST is overpaid as a result of a transaction being incorrectly treated as giving rise to a taxable supply, the Commissioner of Taxation has discretion to withhold the refund in certain circumstances. There has, for some time, been significant uncertainty as to how the discretion operates.

The proposed legislation contains no discretion and specifies that excess GST is eligible for a refund only when:

- excess GST has not been passed on to any other entity, or
- excess GST has been passed on, and:
  - the entity to which it has been passed on to is neither registered nor required to be registered
  - the amount of the excess GST has been reimbursed.

If the conditions for a refund are not satisfied, any excess GST included in an assessed net amount is taken to have always been payable.

- On 8 September 2012, the *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1) 2012* (TLA – TP Act) received Royal Assent.

  The TLA – TP Act confirms that the internationally consistent transfer pricing rules contained in Australia's tax treaties and incorporated into Australia's domestic law provide assessment authority to address treaty related transfer pricing. The purpose of these rules is to limit taxable profits being shifted or misallocated offshore.

  The amendments also provide direct access to Organisation for Economic Cooperation and Development guidance in interpreting the rules and clarify how the proposed subdivision will interact with the thin capitalisation rules in Australian tax law.

  The key operative provision in the TLA-TP Act authorises the Commissioner of Taxation to make one or more determinations to ensure a transfer pricing benefit obtained by an entity can be negated. A determination can lead to an increase in taxable income, a reduction in a tax loss or a reduction in a net capital loss.

  These changes could have a significant impact on financial institutions. We encourage taxpayers with recurring tax losses or low profit levels or significant inter-company debt funding, or have been involved in business restructures to revisit their transfer pricing risk profile and seek advice in relation to how TLA-TP Act may impact their businesses.

  This measure will apply to income years commencing on or after 1 July 2004.

- On 13 September 2012, the *Tax Laws Amendment (Investment Manager Regime) Act 2012* (IMR Act) received Royal Assent. The IMR Act amends the Australian tax legislation to prescribe the following:
  - treatment of returns, gains, losses and deductions, on certain investments by widely held foreign funds
  - taxation treatment of certain returns, gains, losses and deductions for 2010-11 and earlier income years of widely held foreign funds which have not lodged a tax return and have not had an assessment made of their income tax liability.

Taxation rulings and determinations

- On 18 July 2012, the ATO released Tax Determination (TD) 2012/19 'Income tax: when is a non share equity interest "issued at or through a permanent establishment" for the purposes of paragraph 215-10(1)(c) of the *Income Tax Assessment Act 1997 ('ITAA 1997')*? '

  Under Australia's imputation system, distributions made by an Australian resident company out of realised profits are frankable. However, an exception to this general rule is provided in the Australian tax law in section 215-10, which ensures that an Australian-resident, authorised deposit-taking institution (ADI) cannot frank a return it pays for non-share equity interest that forms part of the ADI's Tier 1 capital if the non-share equity interest is issued 'at or through a permanent establishment of the ADI in a listed country' (among other requirements).

  TD 2012/19 clarifies that non-share equity interest will be taken to have been 'issued at or through a permanent establishment' when the capital being raised is a transaction of the business carried on by an ADI at or through the permanent establishment in a listed country. This means that Section 215-10(1)(c) applies where the following occurs:

  - the non-share equity interest must be offered to investors in the course of business conducted by an ADI at or through the permanent establishment in a listed country
  - the non-share equity interest must be allocated to the investor by personnel conducting the business of the permanent establishment;

- transaction documents are executed by the permanent establishment
- transaction documents provide that the non-share equity interest is transferred to the investor at the permanent establishment, and, consequently, the non-share equity interest is transferred at the permanent establishment
- personnel conducting business at the permanent establishment at the time of transfer relinquish all control over the non-share equity interest.

- On 1 August 2012, the ATO released GSTD 2012/6 'Goods and services tax: when an entity makes a taxable supply of second hand goods by way of lease before making a taxable supply of the goods by way of sale (or exchange), are both taxable supplies taken into account to quantify and attribute input tax credits under Subdivision 66A of the A New Tax System (Goods and Services) Tax Act 1999?'

  The GSTD states that, when an entity acquires second hand goods and makes a taxable supply by way of a lease before making a taxable supply by way of sale (or exchange), both taxable supplies are taken into account when quantifying and attributing input tax credits (ITC).

  The amount of the ITC is:

  - 1/11th of the consideration for the acquisition of the goods, or
  - total amount of GST on those taxable supplies if that amount is greater than the aggregate of the GST payable on the taxable supply of the lease and taxable supply by way of sale.

  The ITC is attributable as follows:

  - amount equal to 1/11th of the consideration of the taxable supply of the lease when the consideration is received or invoice relating to that supply is issued
  - any remaining amount when the consideration for the taxable supply by way of a sale is received or an invoice relating to that supply is issued.

  If there is no taxable sale by way of a sale, the acquisition may not give rise to an ITC.

Other developments

- On 16 July 2012, the Treasury released a discussion paper on the Australian government's proposal to amend the income tax laws in relation to bad debts written-off between related parties outside of a consolidated group, as announced as part of the Federal Budget 2012-13.

  The proposed measure is intended to deny the creditor a tax deduction (on a revenue account) for a bad debt written-off where the debtor is a related party and not in the same tax consolidated group. The corresponding gain to the debtor will also be disregarded. The creditor will instead incur a capital loss in respect of the written-off bad debt. There will also be a proposed amendment to treat the borrower's gain on capital account so it is not characterised as assessable income. The measure is intended to introduce better symmetry between the tax treatment of the creditor and the borrower when they are related parties.

- On 16 July 2012, the Treasury released a discussion paper on the Australian government's proposal to clarify that limited recourse debt includes arrangements where the creditor's right to recover the debt is limited (contractually or otherwise) to the financed asset or security provided, as announced as part of the Federal Budget 2012-13.

  The proposed measure may affect the financing of projects where the borrower is a special purpose entity that has minimal or no other assets or income from other sources apart from the project assets.

- On 16 July 2012, the Treasury released a discussion paper on the proposed amendments to the income tax legislation in light of the Australian Prudential Regulation Authority's adoption of the Basel III capital reforms. The amendments are intended to ensure that on commencement of the Basel III capital reforms on 1 January 2013, certain capital instruments issued by authorised deposit taking institutions will not be precluded from being treated as debt for income tax purposes.

- On 13 August 2012, the Business Tax Working group released a discussion paper outlining various proposals for broadening the Australian company tax base to fund a reduction in the company tax rate.

  One proposal of significance for financial institutions is the amendments to tighten the thin capitalisation regime, which aims to limit the capacity of multinational firms to move profits out of Australia by assigning an excessive amount of debt to their Australian operations. When borrowings in relation to the Australian operations exceed a certain threshold, interest expense is no longer deductible.

The discussion paper focuses on the following possible amendments to the thin capitalisation regime relevant for authorised deposit taking institutions:

- increasing the safe harbour for the minimum equity requirement from 4% to 6% of the risk weighted assets of the Australian operations
- increasing the worldwide capital ratio from 80% to 100%.

The discussion paper focuses on the following possible amendments to the thin capitalisation regime relevant for other financial institutions:

- reducing the safe harbour gearing limit for general activities from 75% to 60% (domestic debt-to-total assets basis)
- reducing the safe harbour overall maximum debt limit from 95.24% (on a debt to total assets basis) or 20:1 (on a debt to equity basis) to 93.75% of debt-to-total asset (or 15:1 debt to equity basis).

China

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Tax update

Tax treaty rules on beneficial ownership clarified

The State Administration of Taxation (SAT) recently issued SAT Announcement [2012] No. 30 (Announcement 30) which became effective 29 June 2012. Announcement 30 clarifies the determination of 'Beneficial Owner' for Double Tax Agreement relief (DTA) claim purposes.

Announcement 30 confirms that the determination of whether beneficial ownership exists for a claimant should be based on a totality of facts having regard for the factors listed in Circular 601 (Guoshuihan [2009] No. 601).

A link to Issue 86 of KPMG's 2009 *China Alert* on Circular 601 is provided below:

http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Documents/china-alert-0911-86.pdf

Announcement 30 also stresses the importance of the PRC tax authorities reviewing various legal and financial documents to understand and analyse the 'adverse factors' that will determine whether the non-resident claimant is the beneficial owner as set out in Circular 601.

When seeking relief from PRC dividend withholding tax, a company that is a tax resident of a jurisdiction that has concluded a DTA with the PRC (DTA jurisdiction) and is listed in that jurisdiction (Listed Parent) will automatically be deemed to satisfy the beneficial ownership criteria in respect of PRC dividends received. Further, subsidiaries that are wholly owned by the Listed Parent, directly and/or indirectly, and are tax residents of the same DTA jurisdiction may also automatically be regarded as the beneficial owners of any PRC dividends they receive.

In addition, Announcement 30 clarifies that when an 'agent or designated payee' receives income, in an agency or nominee capacity for another party (the principal), this should not affect the identification of the true beneficial owner. However, relevant documentation and proof (e.g. non-beneficial ownership declaration form) need to be provided.

For further information on announcement 30, please refer to Issue 15 of KPMG's *China Alert*:

http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Documents/china-alert-1207-15.pdf

Value Added Tax reforms piloted in Shanghai rolled out across eight more locations

On 25 July 2012, the State Council of China announced that the VAT reform pilot program would be progressively expanded from Shanghai to Beijing, Tianjin, Jiangsu, Zhejiang, Anhui, Fujian, Hubei, and Guangdong (including Xiamen and Shenzhen) from 1 August 2012 to 31 December 2012. Under the VAT reform pilot program, VAT replaces business tax for income derived from modern services (including consultancy services) and transportation industries, among others. However, financial services are currently outside the scope of VAT reform pilot program.

The Ministry of Finance (MOF) and SAT has then jointly issued Cai Shui [2012] No. 71 (Circular 71) to announce the implementation dates of the VAT reform pilot program for each of the new pilot locations.

Circular 71 also confirmed that the VAT reform pilot program rules in each of the above pilot locations will be substantially the same as those in Shanghai, and that the full complement of Circulars containing rules for the VAT reform pilot program

(except for a particular circular specific to Shanghai based airlines) will apply to the new pilot locations.

For further information on Circular 71 regarding the implementation dates for the VAT expansion, please refer to Issue 17 of KPMG's *China Alert*:

http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Documents/china-alert-1208-17.pdf

For in-depth implementation considerations arising from the VAT expansion, please refer to Issue 16 of KPMG's *China Alert*:

http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Documents/china-alert-1207-16.pdf

Guidance clarifying the corporate income tax treatment of equity incentive compensation plans

SAT issued SAT Announcement [2012] No. 18 (Announcement 18), which became effective 1 July 2012, to clarify the corporate income tax (CIT) treatment concerning equity incentive compensation plans (EICP) of Chinese resident enterprises, which are being increasingly adopted as part of the remuneration packages for their management teams.

The implications of Announcement 18 to the CIT treatment are as follows:

- equity compensation expenses are generally deductible for PRC CIT purposes as salary compensation
- tax deductions should be made when the stock option rights are exercised by the employee. No tax deduction should be made during the vesting period
- amount of tax deduction equals the product of (1) the excess of the company stock's market price per share over the strike price on the exercise date and (2) the number of rights actually exercised by the employee.

For further information on Announcement 18, please refer to Issue 13 of KPMG's *China Alert*:

http://www.kpmg.com/cn/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Documents/china-alert-1206-13.pdf

Tax incentives introduced for building Qianhai, the new Shenzhen service industry zone

The State Council of China officially approved preferential policies to facilitate the development of Qianhai, a special services industry zone in western Shenzhen, adjacent to Hong Kong and Macau.

The project aims to support the development of four modern service industries—finance, modern logistics, information service, and science and technology services—along with other professional service sectors.

A pilot program announced pursuant to Guohan No. 58 (June 27, 2012) provides policies that are 'more preferential' than those applied in the Shenzhen Special Economic Zone.

Tax benefits

Among the tax benefits available for qualifying entities operating in Qianhai are:

- reduced corporate income tax rate of 15%
- excess of individual income tax over that applicable for an expatriate's 'home jurisdiction' will be subsidised for highly skilled expatriates or those whose skills are in shortage in Qianhai
- exemption from business tax for (1) certain international transportation insurance services and (2) income derived from offshore outsourcing services.

The new benefits are intended to attract new and incremental investments in the zone, rather than merely encourage relocation from other areas.

For further information on Guohan No.58, please refer to Issue 18 of KPMG's *China Alert*:

http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Documents/china-alert-1208-18.pdf

Foreign investment in PRC listed securities

The China Securities Regulatory Commission issued guidance that revises the general regulation governing the qualified foreign institutional investment (QFII) program to permit foreign investment in PRC listed securities.

The new QFII regulation (issued July 27, 2012) is viewed as a step towards relaxing China's strict capital controls on inbound

equity portfolio investments by significantly lowering the threshold for QFII license applications and allowing 'smaller' foreign investors, private equity funds, and other institutions to enter the market for the first time.

While new QFII license applicants need to be aware of long-standing uncertainties concerning the tax treatment of QFII arrangements, the new QFII rules are viewed as enhancing the potential for investments by foreign institutional investors in PRC listed securities.

For further information on the amendments to QFII regulation, please refer to Issue 5 of China Alert: Financial Focus:

http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/China-alert-Financial-Service-Focus/Documents/china-alert-FS-1208-05.pdf

India

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Tax update

Transfer of shares in an Indian company by a Mauritius holding company to a Singapore company as a part of internal re-structuring is not liable for capital gains tax under the India-Mauritius tax treaty. The Minimum Alternate Tax provisions are applicable to a foreign company

In the case of *Castleton Investment Limited* [AAR No 999 of 2010], the Authority for Advance Rulings (AAR) held that the transfer of shares in an Indian company by a Mauritius holding company to a Singapore company, as part of internal re-structuring, was not liable for capital gains tax under Article 13(4) of the India-Mauritius tax treaty (tax treaty).

The AAR also held that since the Minimum Alternate Tax (MAT) provisions under the Income-tax Act, 1961 (the Act) do not make any distinction between Indian and foreign companies, the MAT provisions are applicable to foreign companies.

The AAR also held that the transfer pricing (TP) provisions were applicable to the case even though share transfers were not taxable under the tax treaty.

Background

The applicant was a company incorporated in 1993 in Mauritius and was a tax resident of Mauritius. The applicant held the shares of an Indian company for long-term investment. The shares were shown as non-current assets in the accounts of the applicant and not as stock in trade. As part of a group restructuring, the applicant proposed to transfer the shares of the Indian company to a Singaporean group company. The transfer of the shares would be settled by cash at Fair Market Value. The shares were proposed to be transferred off the market.

The applicant did not have a permanent establishment (PE) in India. Further, being a foreign company, the applicant was not obliged to maintain accounts in India as prescribed under the Companies Act, 1956.

Based on these facts, the AAR's views are as follows:

Taxability of capital gains

The shares held by the applicant would be considered as capital assets and any gain from the proposed sale would qualify as capital gains under the Act and the tax treaty. Accordingly, the transfer of shares would fall under Article 13(4) of the tax treaty and be taxable in Mauritius but not in India.

The AAR did not accept the tax department's argument that unless the applicant is actually taxed in Mauritius or is liable to be actually taxed on the capital gains that would arise in Mauritius, the tax treaty is not applicable since a tax treaty can apply only when there is actual taxation in both countries.

The beneficial owner of the shares cannot be said to be another entity and the materials produced by the applicant cannot be said to have been discredited. Even if there was treaty-shopping, this is insufficient to prevent the application of the tax treaty pursuant to the Supreme Court's decision of the *Azadi Bachao Andolan* case.

Applicability of MAT provisions

MAT provisions of the Act do not distinguish between an Indian company and a foreign company. The definition of a company in the Act means an Indian company, or any company incorporated by or under the laws of a country outside India.

The MAT provisions cannot be read to confine its application to domestic companies alone; it is equally applicable to foreign companies. Hence, the MAT provisions are applicable to the applicant.

Capital gains on the transfer of shares in an Indian company by a Mauritius company holding a valid tax residency certificate are not subject to tax under the India-Mauritius tax treaty

The taxation of cross-border transactions involving transfers of shares of an Indian company and the applicability of India-Mauritius tax treaty on the same has been debated for the past several years. The Supreme Court ruling in the *Azadi Bachao Andolan* case upheld the applicability of the India-Mauritius tax treaty. Further, the Supreme Court also upheld the validity of the TRC and Circular No. 789, dated 13 April 2000, which confirms the residential status and beneficial ownership of the taxpayer.

In the case of *Dynamic India Fund I* (the applicant) [AAR No 1016 of 2010], the AAR held that the capital gains arising for a Mauritius entity which holds a valid tax residency certificate (TRC) from the proposed sale of an investment in India shall not be taxable under Article 13(4) of the tax treaty.

The applicant, a Mauritius company, is a 100% owned subsidiary of Dynamic India Fund II (DIF-II), another Mauritius company. The applicant was set up to invest in growing sectors in India. The funds required for investments in India are pooled from various individual and institutional investors from different parts of the world by DIF-II. These funds are invested in India by the applicant.

The applicant obtained a TRC from the Mauritius tax authority which was valid until 14 July 2011 and was further extended to 14 July 2012. The applicant is registered as a Foreign Venture Capital Investor and has obtained a license from the Securities Exchange Board of India (SEBI). Further, the applicant does not have a PE in India.

The applicant has made investments in India in units and shares of Indian companies. The shares were acquired in 2007 and 2008 and have been held with the intention of generating long-term capital appreciation. These units and shares are shown as investments in the books of accounts.

The applicant proposes to sell the shares/units of some of the companies and derive capital gains.

Based on these facts, the AAR ruled that the assets proposed to be transferred fall under the Article 13(4) of the tax treaty and the applicant is a tax resident of Mauritius in the light of its TRC. Pursuant to the Supreme Court's decision of the *Azadi Bachao Andolan* case, the AAR held that capital gains that arise from the investments shall not be taxable in India. It also held that the tax department may consider the provisions of the general anti avoidance rules after it comes into force.

This is a welcome ruling by the AAR which upholds the applicability of the Mauritius tax treaty relying on the *Azadi Bachao Andolan* case. The AAR observed that in light of the decision of the *Azadi Bachao Andolan* case, the pooling of funds from different parts of world by the Mauritian parent company and investment of the funds by a taxpayer did not result in avoidance,.

Interest on government securities accrues only on the date specified in the instrument and not on the last date of a financial year; gains on the sale of government securities by a foreign institutional investor are 'capital gains' and not 'interest'

The Bombay High Court (High Court) held in the case of *Credit Suisse First Boston (Cyprus) Ltd.* (the taxpayer) (ITA No. 1026 of 2011) that interest on government securities accrues only on the date specified in the instrument (i.e. coupon date) and not on any other date.

The High Court also held that gains arising from the sale of government securities by foreign institutional investor (FII) are 'capital gains' and not 'interest'. The taxpayer was entitled to claim benefit of the exemption in respect of capital gains under Article 14(4) of the India-Cyprus tax treaty.

The taxpayer was a company incorporated in and a tax resident of Cyprus. It carried on the business of banking and was registered in India with SEBI as an approved sub-account of Credit Suisse First Boston, an FII.

The taxpayer had invested in government securities on which interest was payable every six months. The taxpayer had offered taxation interest income from debt securities received during the year and claimed exemption for income on the sale of debt securities under Article 14 of the tax treaty.

The Assessing Officer (AO) taxed interest accrued but not due on 31 March 2001, the last day of the financial year. He also classified the gains arising from the sale of government debt securities as interest within the meaning of that term in Article 11(4) of the tax treaty and liable to tax in India as interest.

The Commissioner of Income-tax (Appeals) [CIT(A)] dismissed the additional assessments made by the AO and the Income-tax Appellate Tribunal (the Tribunal) upheld CIT(A)'s Order.

On appeal by the Tax department, the High Court upheld the decisions of the Appellate Authorities by concluding that the consideration received by the taxpayer in respect of the sale of the said securities was a capital gain. The Tax department's submission that the gain from the sale of securities falls under Article 11(4) of the tax treaty was rejected and the income from sale fell under Article 14(4) of the tax treaty.

The ruling clarifies the sale of coupon-bearing government securities by an FII before maturity by holding that such a sale gives rise to capital gains and not interest income.

Korea

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Tax update

Proposal for a transaction tax on futures and options

The Korean Ministry of Strategy and Finance announced a plan to levy a new tax on derivative trading. According to a proposed tax bill unveiled by the Ministry, a 0.001% tax will be levied on KOSPI200 index futures trading, and a 0.01% tax will be charged on KOSPI200 index options transactions, effective 1 January 2016. A grace period of three years to account for the market's condition is being allowed. The new tax will be levied through the Korea Exchange (KRX).

The Ministry said that the new measures are designed to bring the taxation of derivatives in line with taxation of other securities. A tax ranging from 0.3% to 0.5% is currently imposed on share transactions in Korea.

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Tax update

Inland Revenue Board guidelines

Transfer pricing and advance pricing arrangement

The Inland Revenue Board (IRB) has released the revised Transfer Pricing Guidelines 2012 (TP Guidelines 2012) and the Advance Pricing Arrangement Guidelines 2012 (APA Guidelines 2012) to provide further clarification of the administrative requirements pertaining to the arm's length requirement under Section 140A of the Income Tax Act, 1967. The TP Guidelines 2012, which replaces the 2003 TP Guidelines, are largely based on the TP Guidelines of the Organisation for Economic Cooperation and Development.

The revised TP Guidelines are more comprehensive than the 2003 TP Guidelines. They detail the responsibilities of taxpayers with regard to TP compliance and the need to prepare contemporaneous TP documentation to justify that transactions with associated persons or organisations are at arm's length.

The APA Guidelines 2012 provide further explanations on the application process for unilateral, bilateral and multilateral advance pricing arrangements.

Tax treatment of single tier dividends (exempt dividend) in the actuarial surplus transferred from the life fund to the shareholders' fund

Actuarial surplus transferred from the life fund to shareholders' fund is generally subject to tax. The above guidelines clarify the exclusion of tax-exempt single tier dividends from the amount of the actual surplus transferred to the shareholders when calculating the tax liability of the shareholders' fund.

The full guidelines can be accessed from the IRB's website at

http://www.hasil.gov.my

Recent income tax rules gazetted

Income Tax (deduction for the sponsorship of a scholarship for a student of higher educational institution) rules 2012

These new rules allow a company to claim a double tax deduction on scholarships granted directly to Malaysian citizens and resident students when conditions are met.

The rules are effective from the year of assessment (YA) 2012 to YA 2016 for scholarship agreements executed between 8 October 2011 and 31 December 2016.

Recent exemption orders gazetted

Income Tax (Exemption) (No. 5) Order 2012
Income Tax (Exemption) (No. 6) Order 2012

Two orders to effect the proposals in the Budget 2012 on tax incentives accorded to an approved treasury management centre have been gazetted. The orders include the following:

(i) 70% of the statutory income (after deducting tax depreciation) from the provision of qualifying services by the approved treasury management centre to related overseas companies is exempted from tax. For qualifying services

provided to related Malaysian companies, the tax exemption is determined in accordance with a prescribed formula. The exemption is given for a period of five years of assessment.

(ii) During the exempt period, interest payments to non-residents on borrowings by an approved treasury management centre conducting qualifying services are exempt from withholding tax.

The above Orders are effective from YA 2012.

New Zealand

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Tax update

Inland Revenue's compliance focus 2012-2013 released

The New Zealand Inland Revenue (IRD) recently released its compliance focus for 2012-13.

The IRD has indicated that their main areas of focus will be transfer pricing, cross border funding, leasing expenditure, depreciation and international tax issues (i.e. compliance with New Zealand's Controlled Foreign Company and Foreign Investment Fund regimes). Specific industry sectors (such as property and insurance) and high-net worth taxpayers will also receive attention.

The IRD's aim from releasing its annual compliance guide is to proactively encourage voluntary compliance, target inadvertent non-compliance and to detect and deter deliberate non-compliance.

New tax bill introduced

In September 2012, the New Zealand government introduced the Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Bill (the Bill), which focuses on tightening the deductibility rules for assets used for both private and income-earning purposes ('mixed-use' assets). This and other key changes in the Bill are discussed below:

Mixed-use assets –the rules are being tightened beginning in the 2013-2014 income year to disallow certain tax deductions for expenses such as interest, repairs and depreciation relating to periods in which a mixed-use asset is not actually used in the production of taxable income. The expenditure relating to non-use periods will need to be apportioned based on income-earning use as a percentage of total private and income-earning use. Specific rules for interest and to 'ring-fence certain loss making assets are also proposed.

Primary sector tax changes – the rules for valuation of livestock were tightened to stop taxpayers arbitrating valuation methods to gain a tax benefit. The Bill's proposals build on these earlier changes for taxpayers operating in the primary sector.

Goods and services tax changes – The Bill contains changes to allow a non-resident business to register for New Zealand GST and claim input tax deductions even if the non-resident does not have any New Zealand taxable activities (provided they are either registered to pay consumption tax overseas, or carry on a taxable activity with turnover exceeding NZ$60,000 overseas).

Managed funds tax changes – special rules are being introduced to align the tax treatment of offshore share investments by New Zealand managed funds and foreign currency hedging on these assets. This is to remove a tax 'mismatch' which creates volatility for fund managers (as pre-tax hedging is not effective post-tax).

Foreign superannuation tax proposal

The IRD and Treasury officials released a consultative document in July proposing significant changes to the tax treatment of interests in foreign superannuation schemes (which are typically held by New Zealanders who have worked offshore or new migrants).

The current tax rules in this area are complex, arbitrary, and can tax even when there is no income or cash-flow from the scheme. As a result there has been widespread non-compliance to date.

To alleviate a number of these current concerns, the proposal is to tax foreign superannuation schemes on a receipts basis, with the portion of the lump-sum withdrawal to be taxed depending on the period a holder of such a scheme has been a New Zealand resident. (The longer the residence period, the higher the taxable portion.) Foreign pensions will continue to

be fully taxable on receipt. A limited amnesty is proposed to deal with past non-compliance.

Agreements for the sale and purchase of property and services

Officials have signalled changes to the tax rules for foreign currency agreements for the sale and purchase of property and services (ASAPs). This will be relevant for New Zealand businesses that acquire goods (e.g. trading stock or fixed assets) from overseas on deferred payment terms.

The current tax rules are too complex, resulting in inconsistent application and often volatile foreign currency movements, which do not necessarily represent the cash paid/received which must be taken into account for tax,.

The proposals are aimed at aligning the tax and accounting treatments for foreign currency ASAPs.

Taxing lease incentives

Due to tax revenue risk concerns, officials have released proposals to tax inducements to enter into a lease (the receipt of such amounts is currently non-assessable to a prospective tenant, while their payment is generally deductible to lessors). Both income and deductions will need to be spread over the term of the underlying lease or until the first rent review date (if shorter). As presently proposed, the new treatment will apply to leases entered into on or after 26 July 2012.

Double Tax Agreement developments

Earlier this year, the New Zealand government announced the signing of an updated Double Tax Agreement (DTA) with Canada. The new DTA provisions have yet to come into force.

In June 2012, the New Zealand government announced that New Zealand and Japan had agreed, in principle, to update the existing DTA between the two countries. Negotiations to update New Zealand's DTAs with the Netherlands and the United Kingdom are ongoing, as are negotiations with Luxembourg for a tax treaty.

Philippines

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Tax update

Tax Treatment of income earnings and money remittances of an overseas contract worker or overseas Filipino worker

Revenue Regulations (RR) No. 11-2012, dated 17 August 2012, provides that money remittances of all overseas contract workers (OCWs) or overseas Filipino workers (OFWs) shall be exempt from Documentary Stamp Tax (DST) upon showing of the overseas employment certificate, a valid overseas workers welfare administration membership certificate, or the electronic receipt issued by the Philippine Overseas Employment Administration.

The regulations also require local banks and non-bank money transfer agents to document remittances made by OCWs or OFWs and inform, on a quarterly basis, the Revenue District Office or the Audit division under the Large Taxpayers Service where the banks and non-bank money transfer agents are registered. The reporting is due on or before the 20th day following the close of each quarter.

Transfer of ownership of shares not traded on the stock exchange

Pursuant to Revenue Memorandum Circular (RMC) No. 37 2012, dated 3 August 2012, it is necessary to secure a certificate authorizing registration to transfer ownership of shares not traded on the stock exchange. In addition, the tax payment receipts should be filed with and recorded by the secretary of the corporation.

Singapore ▲Top

Tax update

GST remission of expenses for prescribed funds managed by prescribed fund managers in Singapore

The Minister for Finance introduced a GST remission scheme under which funds meeting the qualifying conditions will be able to recover a fixed rate of GST incurred on all expenses (except expenses disallowed under GST Regulations 26 and 27) from 22 January 2009 to 31 March 2014, without requiring the funds to register for GST.

In this regard, the fixed recovery rate for expenses incurred during the year ending 31 December 2013 will be 87%.

Sri Lanka

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Tax update

Legislative Changes for 2012

The legislative changes for 2012 relevant to banks and financial institutions are as follows:

Development activities carried out by specified bank branches

Profits of a newly set up branch of a commercial bank dedicated to development banking will be taxed at a concessionary rate of 24%, as compared to the current applicable rate of 28%.

The measure is effective 1 April 2012.

Exemptions for unit trusts and mutual funds

VAT (Amendment) Act No. 12 of 2012 clarified that income from the redemption of a unit of unit trust or mutual fund should be exempt from income tax. In addition, a unit trust or mutual fund is not required to pay financial VAT.

Exemptions for interest income from loans granted to new undertakings

An income tax exemption is available for interest on loans to certain 'new undertakings' which commence commercial operations after 1 April 2011.

The measure is effective from 1 April 2012.

Taiwan

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Tax update

Latest development on capital gains tax

The recent amendments to the Income Tax Act and the Basic Income Tax Act result in the imposition of a capital gains tax on capital gains from trading of Taiwan securities which were previously exempted from income tax.

The key features of the capital gains tax regime are:

For individuals:

1. Individuals deriving capital gains from sale of shares will be subject to income tax.
2. Tax regime for 2013 and 2014:
   (a) Two methods are used to calculate the capital gains tax - the 'deemed basis' and the 'actual basis'. Except for specific cases where the actual basis is required to be used to determine the capital gains tax, the deemed basis should be adopted.
   (b) Capital gains tax is calculated using the actual basis under the following situations:
      - sale of unlisted shares and shares that are not sold over-the-counter (OTC)
      - sale of emerging shares (i.e. shares trading on the Taiwan emerging stock market as opposed to the main board) exceeding 100,000 shares within a year
      - sale of shares under initial public offering (IPO), excluding:
         - IPO shares which are first listed on the stock market or traded OTC before 31 December 2012
         - shares obtained via underwriting of IPO shares provided the number of shares is less than 10,000 shares
      - sale of all types of shares by non-Taiwan residents.
   (c) Capital gains tax will be calculated using the deemed basis under the following situation:
      - when the Taiwan stock market index exceeds 8,500 points, the capital gains tax on the sale of listed shares, OTC shares and emerging shares is calculated using the applicable deemed income rate (0.2%~0.6%) and subject to withholding at source.
3. Tax regime from 2015:
   (a) only the scenarios listed in 3(b) below will be subject to capital gains tax calculated using the actual basis.
   (b) in addition to the situations under 2(b), sale of listed shares, OTC shares and emerging shares by individuals exceeding NT$1 billion within a given year will also be subject to capital gains tax.
4. Tax rates: 15% for using actual basis of calculating the capital gains tax.
5. Special benefits for long-term holding positions:
   - individuals holding the shares for more than one year are only required to report 50% of the capital gains from sale for capital gains calculation purposes
   - individuals holding IPO shares for more than three years after listing or OTC shares are only required to report 25% of the capital gains from the sale for capital gains calculation purposes.
6. Capital loss: any capital loss incurred can be offset against the capital gains derived in the same year. The capital loss cannot be carried forward for future utilisation.

For Corporations:

- Capital gains from securities and futures trading will be subject to the Alternative Minimum Tax (AMT).
- The deductible amount for the AMT calculation is reduced from NT$2 million under current AMT regime to NT$500,000.
- The AMT rate will range from 12% to 15%.

Companies holding shares for three years or more are only required to report 50% of the capital gains from the sale of these shares for AMT calculation purposes.

Thailand

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Tax update

Income tax exemption to individual on sale of securities on the stock exchanges of ASEAN member countries

Ministerial Regulation No. 290 was issued in June 2012 to provide income tax exemption to individuals on income from sale of securities on the Stock Exchanges of ASEAN member countries. To qualify for the exemption, the transactions have to be executed through the system as established by the Stock Exchange of Thailand which shall link to the Stock Exchanges of ASEAN countries.

The tax exemption does not cover any income from the sale of treasury bills, bonds, bills of exchange or debentures.

Income tax exemption to the juristic company and individual in the case of merger of businesses

Royal Decree No. 542 and Ministerial Regulation No. 291 issued in September 2012 provide corporate income tax and personal income tax exemptions to benefits derived from a merger and entire business transfer (EBT), which consists of a swap of shares in the merger/amalgamated company or transferee of the EBT.

Income tax exemption on the income received from provident fund upon retirement

Ministerial Regulation No. 292 was issued in September 2012 to amend clause 36 of the Ministerial Regulation No. 126 on individual income tax exemptions. The new Regulation exempts the individual income tax levied on benefits derived from qualified provident funds upon termination of employment at an age not less than 55 year old. The exemption became effective 1 January 2010.

Statement from the director general of the Thai Revenue Department

Recently, Dr. Sathit Rungkasiri, director-general of Thai Revenue Department (TRD), stated that the TRD's policy is to support international investment by establishing a double tax agreement network, reducing corporate tax rates as well as formulating various tax policies to enhance the competitiveness of Thailand. However, it is also a priority for the TRD to protect Thailand's interests by ensuring adequate tax collection.

The business activities of multinational corporations in Thailand are expected to increase once Thailand enters into the ASEAN Economic Community in 2015. In this regard, the TRD is proposing to reform its international tax regulations to strengthen the Thai economy, as well as to protect Thailand against improper tax avoidance. Possible measures include new regulations on:

- transfer pricing
- thin capitalization
- controlled foreign companies; and
- general anti-avoidance rule

Vietnam

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Tax update

Update on Corporate Income Tax and VAT regulations for the financial services sector

The Ministry of Finance issued (i) Circular 123/2012/TT-BTC (Circular 123) dated 27 July 2012 replacing Circular 130/2008/TT-BTC on Corporate Income Tax (CIT); and (ii) Circular 06/2012/TT-BTC (Circular 06) dated 11 January 2012 on VAT. Notable points related to the banking and financial sector are as follows:

CIT (Circular 123)

- For capital/securities transfer activities, only expenses directly related to the transfer would be tax deductible
- Expenses for the purchase of life insurance for employees are deductible, provided that the entitlement conditions and beneficial amounts are stated in the required supporting documents
- Costs of tools and equipment less than the standards of recognised fixed assets can be expensed over a maximum of two years
- In case the payment for capital/securities transfer is settled in kind, such as non-monetary assets or other material benefits (shares, fund certificates, etc), the income from such a transfer shall be subject to CIT
- Differences between the selling price and the face value (i.e. share premium) in the case of issuance of new shares of a shareholding company are not subject to CIT
- Gains from the revaluation of assets (excluding land use rights) used for capital contributions shall be treated as other income generated during the tax period for CIT purposes

VAT (Circular 06)

- Circular 06 provides more clarity to some of the notable financial related services which are now not subject to VAT, including:
  - foreign currency trading
  - issuance of credit cards
  - domestic and international factoring services
  - debt sales
  - 'Margin' transactions in securities trading and cash advances for sales of securities
- Input VAT in respect of fixed assets, machinery and equipment of credit institutions will not be creditable for VAT purposes. Instead, the VAT will form part of the gross book value of such assets eligible for depreciation claims, where applicable.

Updates on foreign contractor withholding tax regulations for the financial services sector

On 12 April 2012, the Ministry of Finance issued Circular 60/2012/TT-BTC (Circular 60) which replaces Circular 134/2012/TT-BTC on foreign contractor withholding tax (FCT). Notable points related to the banking and financial sector under Circular 60 include the following:

- interest earned from bonds (except for tax exempt bonds) and certificates of deposit are subject to FCT
- Circular confirms that taxable revenue in case of interest rate swap transaction shall be the difference between the interest receivables and interest payables that a foreign contractor receives during a calendar year
- Circular does not provide the value added percentage for interest income of foreign lenders. Hence, it still leaves room for interpretation
- Amended deemed CIT rates applicable to particular services are as follows:

Business Lines	Original CIT rate under Circular 134	Revised CIT rate under Circular 60
Re-insurance overseas, re-insurance commission	2%	0.1%
Financial derivatives	N/A	2%
Interest Income	10%	5%

Circular 60 shall take effect on 27 May 2012. Contracts signed before that date will continue to be governed by the FCT regulations effective at the time the contract was signed. Exceptions apply for certain cases, such as the new FCT rates for interest on foreign loans and re-insurance premiums, shall be effective 1 March 2012.

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