General tax update for financial institutions in Asia Pacific

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Issue 53, October 2015

This publication continues our series of updates on tax issues affecting Financial Institutions in the Asia Pacific region.

Many jurisdictions in the region have been introducing new measures and regulations to correspond to the various BEPS action plan items proposed by the OECD, which will have significant international tax and transfer pricing implications for companies operating across the world.

Highlights

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Australia

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Legislative developments

Common Reporting Standard

On 3 June 2015, at the annual Ministerial Council Meeting of the Organisation for Economic Cooperation and Development ("OECD"), Australia signed the Multilateral Competent Authority Agreement ("MCAA") which enables financial account information to be exchanged between countries' tax authorities under the Common Reporting Standard ("CRS").

The CRS calls on the tax authorities of jurisdictions to obtain financial account information from the financial institutions of their jurisdictions and automatically exchange that information with the tax authorities of other jurisdictions on an annual basis.

Implementation of the CRS will require banks and other financial institutions to collect and report to the Australian Taxation Office ("ATO") financial account information on non-residents. The ATO will exchange this information with the foreign tax authorities of the non-residents. In parallel, the ATO will receive financial account information on Australian residents from other countries' tax authorities.

Exposure Draft legislation for the implementation of CRS in Australia was expected to be released for public consultation in September 2015. The start date of the CRS on-boarding procedures is expected to be 1 January 2017, but reporting financial institutions are likely to be given the option of deferring the start date to 1 January 2018 by providing notification to that effect to the ATO.

In addition, on 7 August 2015, the OECD released three new reports to assist jurisdictions and financial institutions in implementing the CRS:

- Common Reporting Standard Implementation Handbook: this is intended to provide practical guidance to assist government officials and financial institutions in the implementation of the CRS. It sets out the necessary steps for implementation and promotes the consistent use of optional provisions, identifies areas for alignment with the US Foreign Account Tax Compliance Act ("FATCA"), and addresses the operational and transitional challenges resulting from the staggered implementation of the CRS.
- Offshore Voluntary Disclosure Programmes: this contains a discussion of practical experience from 47 countries in relation to their voluntary disclosure programmes. It is designed to encourage non-compliant taxpayers to make voluntary disclosures before the automatic exchange of information under CRS is implemented.
- Model Protocol to the Tax Information Exchange Agreements ("TIEAs"): this report provides the basis for jurisdictions wishing to extend the scope of their existing TIEAs to also cover the automatic and/or spontaneous exchange of tax information.

The Explanatory Memorandum to the Australian legislation is expected to reflect much of the guidance provided by the OECD in the Implementation Handbook.

Board of Taxation report

- Tax arrangement applying to Collective Investment Vehicles:

  On 4 June 2015, the Government released the Board of Taxation's ("BoT") final report on the tax arrangements applying to Collective Investment Vehicles ("CIVs").

  The report has made a number of recommendations which seek to enhance Australia's status as a leading regional financial centre and support growth and employment in the Australian managed funds industry.

  In particular, the BoT has recommended that a suite of new CIVs be introduced to support the Australian managed funds industry. The proposed Corporate, Limited Partnership and Common Contractual Fund CIVs are based on existing foreign structures, and aim to provide investors with tax outcomes broadly consistent with direct ownership (other than flow-through of losses).

  The BoT has recommended common requirements for each CIV regime, including:

  i. a widely-held requirement; and

  ii. a passive investment requirement.

Country-by-country reporting

On 6 August 2015, the Australian Government released Exposure Draft legislation that proposes to implement, for tax years starting on or after 1 January 2016, the OECD's recommendations that all jurisdictions require multinationals to provide transfer pricing information as 3 standardised reports:

- a country-by-country ("CbC") report, which contains high-level information on the global allocation of the income, taxes paid, location and main business of each group member;
- a Master File, which reports the group's organisational structure, main businesses, location, intangibles, inter-company financial activities, financial position and tax positions; and
- a Local File, which reports the nature and pricing of transactions undertaken by the local entity (either a subsidiary or permanent establishment) with associated enterprises in other countries.

The rules will apply to an Australian resident, or a non-resident with a permanent establishment in Australia, if the group's "annual global revenue" exceeds $1 billion.

Certain clarifications and changes to the Exposure Draft will be required, so that the operation of the proposed rules can be properly implemented with clarity and consistency.

Enhanced third party reporting and data matching

On 10 July 2015, the Treasury released Exposure Draft legislation that proposes to improve taxpayer compliance by increasing the information reported to the ATO by a range of third parties.

The Exposure Draft proposes the creation of a new reporting regime requiring certain entities ("third parties") to report information to the ATO on certain types of transactions that could reasonably be expected to have tax consequences for other entities.

Specifically, the following third parties will be required to report under the new regime:

- market participants, listed companies, trustees of trusts with an absolutely entitled beneficiary, and the corporate regulator (Australian Securities and Investments Commission) must report on transactions involving securities;
- trustees of unit trusts must report on transactions relating to units in unit trusts;
- administrators of payment systems must report on electronic business transactions;
- government-related entities (other than local government bodies) must report on the payment of government grants;
- government-related entities must report on financial benefits they provide for services;

- states and territories must report on transfers of real estate in their jurisdictions.

This measure is proposed to apply to transactions that happen on or after 1 July 2016.

Taxation rulings and determinations

Taxation Ruling TR 2014/7 – partial withdrawal

On 24 June 2015, the ATO partially withdrew Taxation Ruling TR 2014/7. Parts of this ruling had caused significant uncertainty for many taxpayers, including superannuation funds, banks and custodians.

In the original version of this ruling (which had been issued in December 2014), the ATO had articulated that gains/losses from foreign exchange (FX) derivatives would be sourced where the relevant contracts were concluded. This was relevant for taxpayers, particularly superannuation funds, when calculating their caps in respect of foreign income tax offsets ("FITO") for foreign taxes paid. In an attempt to provide the super funds with some practical guidance, the ATO had also indicated that it would accept that the contract was formed where the super fund's counterparty under the relevant FX derivative was located (this has been referred to as the "proxy" approach) – for instance, if an Australian super fund entered into an FX derivative with Bank A acting through its London branch, then the source of the gain/loss would be in London and therefore foreign sourced.

The introduction of the "proxy" had started to affect behaviour in the market. In particular, banks started receiving requests from Australian super funds that they needed to enter into FX derivatives with an entity located in Australia – in the case of a foreign bank, that would typically be an Australian branch of the foreign bank. In many cases, it was difficult for the foreign banks to comply with this request – as the booking of FX derivatives had often been centralised in a single location overseas. The super funds and their custodians also realised that they did not necessarily have the systems to track the proxy (i.e. to identify the location of the counterparty). In other words, as well as having little technical basis, the "proxy" also did not work in practice.

The year ended 30 June 2015 (to which the original ruling still applies) was a year in which FX hedging losses exceeded FX hedging gains for many funds. Therefore, the denial of FITOs for the 2015 tax year resulting from the position adopted by the ATO in relation to source in the original ruling has been of significant concern to the superannuation industry. If the principles in the original ruling result in the denial of FITOs in any given year, the potential loss, based on a typical balanced fund asset allocation, could be as high as 5-10 bps (or $500,000 - $1 million for every $1 billion of net assets).

The partial withdrawal has now updated the ruling to remove the references to how the source of a foreign currency hedging gain is determined (including the proxy).

Although the original version of the ruling will still apply for the income year ending 30 June 2015 (so that taxpayers can still rely on the proxy), the new ruling (with no commentary on source and the removal of the proxy) will apply from 1 July 2015.

The ATO ultimately intends to issue a further revised ruling on source issues. In this regard, the ATO has recognised that it is critical to engage with industry to understand precisely how FX derivative contracts are formed, and to gain a full picture of the variety of commercial practices in respect of FX trading. It has already commenced dialogue with particular funds and FX managers to understand the mechanics of how FX trades (both manual and electronic) are executed, including:

- contract terms;
- where those terms come from;
- how the traditional principles of contract law (regarding offer and acceptance) apply;
- the prevalence of particular types of trading; and
- documentation requirements and constraints.

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China

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Legislative developments

In October 2014, the State Administration of Taxation of the PRC announced in Caishui 2014 No.79 ("Circular 79") that Qualified Foreign Institutional Investors ("QFIIs") and RMB Qualified Foreign Institutional Investors ("RQFIIs") are temporarily exempt from PRC Corporate Income Tax ("CIT") in respect of China sourced gains derived from the transfer of shares (and other equity investments) on or after 17 November 2014. In respect of China sourced gains derived by QFIIs and RQFIIs from the transfer of shares prior to 17 November 2014, Circular 79 prescribes that such gains would be subject to CIT in accordance with the CIT Law.

Taxation Notice

After the publication of Caishui 2014 No.79, the PRC tax authorities decided to collect Withholding Tax ("WHT") on capital gains derived from equity investment retrospectively for the period from 17 November 2009 to 16 November 2014, which effectively represents a "claw-back" period of 5 years. The tax authorities in Beijing and Shanghai have issued Tax Notices to QFIIs and RQFIIs to notify them to complete the filings before 31 July 2015 and 30 September 2015 respectively.

QFIIs and RQFIIs could claim tax treaty relief for the capital gains. But the tax authorities do not have a clear guideline on the assessment of treaty relief. Currently treaty relief application is reviewed by the PRC tax authority on a "case-by-case" basis.

In addition, the tax authorities now require QFII/RQFII to clear all outstanding WHT on cash dividends, stock dividends and interest since its establishment. There is currently no statute of limitation in practice applicable to the tax collection on such interest and dividends.

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Hong Kong

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Legislative developments

Extension of offshore funds exemption to private equity funds

The Hong Kong offshore funds tax exemption ("exemption") regime was introduced in 2006. Unlike hedge funds, historically private equity ("PE") funds have not been able to rely on the regime to exempt their transaction profits from Hong Kong profits tax.

Legislative changes extending the exemption regime to PE funds have been approved by the Hong Kong Legislative Council on 13 July 2015, and have been gazetted on 17 July 2015.

The legislative changes have been long anticipated and will be welcomed by the Hong Kong PE industry. The key features of the new legislation include:

- Extending the scope of transactions covered by the exemption to include investments in private companies incorporated outside of Hong Kong. This is naturally a key feature of a PE fund's business so this is a very important change.
- Exempting special purpose vehicles ("SPVs"), including Hong Kong SPVs, from Hong Kong profits tax on gains on disposal of a qualifying offshore portfolio company (this also includes gains by one SPV from the disposal of another SPV which holds a qualifying offshore portfolio company).
- Loosening an existing requirement that qualifying transactions be arranged through a person with a Securities and Futures Commission ("SFC") license in order to rely on the exemption. For offshore PE funds, the SFC license requirement has been removed where the fund has at least five investors at its final close which have collectively committed more than 90 percent of the capital of the fund.

However, there remain some areas of uncertainty. For example, amongst others, treatment of disposal gains realized by a qualifying SPV on disposal of shares in a listed company (i.e. post IPO). In particular, the Hong Kong Inland Revenue Department ("IRD") is expected to revise its practice notes soonest possible – to provide further clarification and guidance in respect of the extension of the exemption regime to PE funds.

Other developments

Consultation on Automatic Exchange of Information

Hong Kong does not currently allow for the automatic exchange of information ("AEOI"). Exchange of information can only be made under the Comprehensive Avoidance of Double Taxation Agreement ("CDTA") or Tax Information Exchange Agreement ("TIEA") and on a request basis. However, the Hong Kong Government has committed to the automatic exchange of information to comply with the Organization for Economic Co-operation and Development's ("OECD") standard. Amending legislation will be required in order to allow the Hong Kong Government to exchange information automatically. On 24 April 2015, the Hong Kong Government issued a consultation paper to gather feedback on the following seven key aspects:

a. the proposed scope of Financial Institutions ("FI"), non-reporting FIs and excluded accounts;

b. the types of information FIs have to secure from account holders;

c. the due diligence procedures and reporting requirements that FIs have to follow;

d. the powers of the IRD to collect relevant information from FIs and forward such information to designated bilateral AEOI partners;

e. the proposed sanctions for failure to comply with the AEOI requirements;

f. the mechanism for FIs to meet the confidentiality safeguards; and

g. the related information technology infrastructure to support the implementation.

Under the OECD standard, FIs include banks, custodians, insurance companies, brokers and investment entities (such as collective investment vehicles), unless they present a low risk of being used for evading tax and are excluded from reporting. FIs are required to identify and keep information of their non-Hong Kong tax resident account holders in accordance with the due diligence procedures prescribed in the OECD standard and report the details of the reportable accounts to the IRD in a prescribed format. For account holders who are tax residents of AEOI partners, the IRD will pass the relevant information to the AEOI partners on an annual basis.

The Hong Kong Government also proposed that the AEOI be conducted on a bilateral basis with jurisdictions with which Hong Kong has signed a CDTA or a TIEA. In identifying AEOI partners from amongst the CDTA or TIEA partners, the Hong Kong Government will take into account their capability in meeting the OECD standard and in protecting data privacy and confidentiality of the information exchanged in their domestic law.

The first automatic information exchanges are expected to commence by 2018. FIs will be required to commence due diligence procedures in 2017. The Hong Kong Government is proposing that an Inland Revenue Ordinance Amendment Bill be introduced into the Legislative Council in early 2016 and the necessary legislation be in place by 2017.

New protocol of the tax treaty between Hong Kong and China

The Hong Kong-China Comprehensive Avoidance of Double Taxation Agreement ("the HK-China CDTA") entered into force on 8 December 2006 and has been supplemented by a number of, subsequent, protocols. The latest (i.e. the fourth) protocol ("the Protocol") has been signed on 1 April 2015. The main implications of the Protocol are:

- The withholding tax rate on royalties (i.e. lease rentals) from aircraft and ship leasing business (excluding the interest portion under a finance lease arrangement) will be reduced from 7% to 5%, which is the lowest among the tax treaties that China has concluded in Asia and Europe.
- The capital gain exemption will be expanded to cover sale and purchase of shares in listed companies.
- To align with global trends, a main purpose test, similar to that proposed by the OECD in its discussion draft regarding BEPS (Base Erosion and Profit Shifting) Action 6, will be introduced into the HK-China CDTA.
- Information regarding VAT, consumption tax, business tax, land appreciation tax and real estate tax in China will be subject to the information exchange arrangement going forward.

The Protocol will come into force after the completion of ratification procedures and notification by both sides.

Notes exchanged with Japan in relation to exchange of information under tax treaty

On 6 July 2015, the IRD announced that, on 10 Dec 2014, Hong Kong exchanged notes with Japan regarding the Exchange of Information ("EoI") Article in the Agreement between Hong Kong and Japan for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on Income (HK-Japan CDTA). The HK-Japan CDTA constituted by the notes exchanged shall have effect in respect of Hong Kong tax for any year of assessment beginning on or after April 1, 2016.

The purpose of the exchange of notes with Japan is to expand the coverage of tax types under the EoI arrangement of the HK-Japan CDTA. Information regarding inheritance tax, gift tax, and consumption tax in Japan will be subject to the EOI arrangement going forward.

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India

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Legislative developments

Key highlights of the amendments to the Finance Bill / Union Budget 2015

The Indian Finance Minister presented the Finance Bill 2015 ("the Bill") on 28 February 2015 before the Parliament. On 30 April 2015, the amendments to the Budget have been tabled in the Parliament by notice of amendments. The key amendments are highlighted below:

- Residential status of companies – Place of effective management ("POEM")

  The Bill had proposed that apart from an Indian company, any company whose POEM at any time during the year is in India, shall be considered to be a resident of India.

  The words 'at any time' are now omitted, thereby relaxing the stringency in the test / rule.

- Minimum Alternative Tax ("MAT")

  The Bill had proposed that the income from transactions in securities (other than short-term capital gains arising on transactions on which Securities Transaction Tax ("STT") is not chargeable) arising to a Foreign Institutional Investor ("FII") / Foreign Portfolio Investor ("FPI") shall be excluded from the chargeability of MAT and the profit corresponding to such income shall be reduced from the book profit. The expenditure, if any, debited to the profit loss account, corresponding to such income (which is being proposed to be excluded from the MAT liability) are also proposed to be added back to the book profit for the purpose of computation of MAT.

  It is now proposed that any income accruing or arising to any foreign company by way of capital gains from transactions in securities, interest, royalties or fees for technical services shall be excluded from the ambit of MAT, i.e. by excluding both the income and corresponding expenses in the computation.

- Fund managers in India not to constitute business connection of offshore funds

  In order to facilitate the location of fund managers of offshore funds in India, a specific regime has been proposed in the Income-Tax Act, 1961 ("the Act") in line with international best practices, subject to fulfilment of certain conditions by the fund and the fund manager. It was proposed in the Budget that fund management activities undertaken in India by an eligible fund manager on behalf of an eligible offshore fund will not constitute a business connection in India for the offshore fund.

  The following eligibility criteria have now been relaxed for an investment fund set up by the government or the central bank of a foreign state or a sovereign fund, or such other funds as may be notified by the Central Government:-

  i. The fund must have at least 25 investors who are not connected persons (as defined);

  ii. No individual investor (including connected person) can hold 10 percent or more in the fund; and

  iii. The aggregate participation interest of 10 or less members along with their connected persons shall be less than 50 percent of the fund.

  Further, it is proposed that the benefits under the safe harbour provisions shall be applied in accordance with guidelines to be prescribed by the Central Board of Direct Taxation ("CBDT").

- Amendments relating to Global Depository Receipts ("GDRs")

  The revised bill provides that the period of holding of any capital asset, being a share or

shares of an Indian company, which are acquired by a non-resident taxpayer on redemption of GDRs held by such non-resident taxpayer in accordance with prescribed guidelines shall be reckoned from the date on which the request for such redemption was made. Further, the cost of acquisition of such share or shares shall be their price prevailing on any recognized stock exchange on the date on which the request for such redemption was made.

Government accepts the recommendation of the A. P. Shah Committee to clarify the inapplicability of MAT to FIIs/ FPIs

Section 115JB(1) of the Act provides that in case of a company, where the income tax payable on the total income as computed under the Act is less than 18.5 percent of its book profit, such book profit shall be deemed to be the total income of the company and the tax payable by the company on such total income shall be the amount of income tax at the rate of 18.5 percent (plus surcharge and cess). As per the method prescribed for computing 'book profits', certain additions/ exclusions are provided.

The issue of applicability of MAT to FPIs is of recent origin. The FPIs (i.e. erstwhile FIIs) have been investing in India for more than two decades and this issue was never discussed by the Income Tax Authorities ("ITA") in the context of FIIs/FPIs until the Authority for Advance Rulings ("AAR") in the case of *Castleton Investment Ltd [2012] 348 ITR 537 (AAR)* ("Castleton") ruled that MAT provisions were applicable to foreign companies even though they did not have any places of business/ permanent establishment ("PE") in India. Pertinently, in Castleton's case, the AAR departed from its earlier rulings in the case of *The Timken Company [2010] 326 ITR 193 (AAR)* and *Praxair Pacific Limited [2010] 326 ITR 276 (AAR)* where it had ruled that MAT was inapplicable to foreign companies unless they had physical presence in India. The judgment of the AAR in Castleton's case has been challenged before the Supreme Court of India.

- Amendments made in the Finance Act, 2015 towards applicability of MAT to FPIs

  The issue got further complicated on account of the amendments made, vide the Finance Act, 2015, to the existing provisions of section 115JB of the Act to exclude income from capital gains arising on transactions in securities (other than short term capital gains on non-STT sale transactions), accruing or arising to an FPI from the computation of book profits with effect from 1 April 2015.

  On 30 April 2015, the Finance Minister through a Notice of Amendments to the Finance Bill, 2015 proposed that any income accruing or arising to any foreign company by way of capital gains from transactions in securities, interest, royalties or fees for technical services shall be excluded from the ambit of MAT i.e. by excluding both the income and corresponding expenses in the computation. The said amendments are now part of the Finance Act, 2015 with effect from 1 April 2015.

  The amendment provided further relief to the FPIs investing in debt securities as interest income chargeable to tax at concessional rate of 5 per cent would be outside the purview of MAT. However, the ambiguity still prevailed with regard to the applicability of MAT to past years (i.e. years prior to 1 April 2015).

- Tax department's stance on applicability of MAT to FPIs

  In view of the above ruling and considering the prospective amendments, the tax authorities took a view that MAT levy should apply to income earned by FPIs incorporated as a "company", including capital gains of FPIs as a part of book profits and being taxed the same at 18.5 percent. As a result, tax demand notices on account of MAT liabilities were issued to FPIs.

- Recent developments – relevant for applicability of MAT prior to 1 April 2015

  In this regard, several representations were made by various stakeholders before the Government for non-applicability of MAT provisions to FPIs for the years prior to 1 April 2015. Further, several FPIs on whom MAT demands were raised had either approached the Commissioner of Income Tax (Appeals) ("CIT(A)") or Dispute Resolution Panel ("DRP") or filed a writ petition before the Bombay High Court litigating the issue.

  Accordingly, a Committee headed by Justice A. P. Shah was formed in May 2015 by the Government to examine certain 'legacy' tax issues, including the issue of MAT levy on FPIs. This Committee had to interact with various stakeholders, officers from the Revenue and the CBDT for consultations/ discussions and provide its recommendation on MAT levy on

FPIs expeditiously, which would be taken into consideration while taking the future course of action.

Further, the CBDT, via its letter dated 11 May 2015, issued instructions to the tax officers:

i. not to undertake any coercive action for recovery of tax demands already raised by invoking MAT provisions in the case of foreign companies;

ii. not to issue any fresh notices for reopening of cases and completion of assessments to be put on hold unless they are getting barred by limitation;

Also, the CBDT, via its letter dated 24 April 2015, instructed its tax officers in case of all FIIs seeking tax treaty benefits to 'expeditiously' decide such claims within one month from the date they are filed.

The Committee submitted its final report to the Government on 25 August 2015. The Committee recommended that Section 115JB of the Act be amended to clarify the inapplicability of the provisions of Section 115JB of the Act to FIIs / FPIs having no PE / places of business in India.

Given the above, the CBDT, via Press Release dated 1 September 2015, informed that the Government has accepted the said recommendations of the Committee and has decided that an appropriate amendment to the Act will be made in due course. Through the amendment, the Government proposes to clarify that MAT provisions will not be applicable to FIIs / FPIs not having a place of business / PE in India, for the period prior to 1 April 2015.

In addition to the above, the CBDT has issued Instructions No. 9/2015 dated 2 September 2015, wherein the tax officers are advised to take into consideration the above position and hold in abeyance, for the time being, the pending assessment proceedings in cases of FIIs / FPIs involving the issue pertaining to the applicability of MAT provisions for the period prior to 1 April 2015. Further, they are advised not to pursue the recovery of outstanding tax demands, if any, in such cases.

- Our Comments

The recommendation of the Committee for amendment of Section 115JB of the Act and issuance of a circular by the CBDT to provide for complete inapplicability of MAT provisions to FPIs even for the years prior to 1 April 2015 have come as a big sigh of relief to those who otherwise may have been required to litigate the matter for years to attain certainty on the issue. This indeed should go a long way to restoring the confidence of the FPIs investing in India which in the last couple of years had taken a back seat considering the retrospective amendments and the aggressive approach of the ITA.

The recommendations of the Committee are specifically in relation to foreign companies investing in India under the FPI route. One expects that these recommendations should equally be applied to all cases where foreign companies other than FIIs/FPIs invest/earn income from India and do not have any physical presence in India. However, this issue is still not free from doubt and one will have to adopt a wait-and-watch approach to gauge the ITA's treatment of such entities.

Tax court cases summaries

Deputy Director of Income Tax v. Serum Institute of India Ltd (IT Appeal No. 792/PN/2013)

- Background

Section 90(2) of the Act provides that the provisions of the Double Taxation Avoidance Agreements ("DTAAs") would override the provisions of the domestic Act in cases where the provisions of DTAAs are more beneficial to the assessee.

Section 206AA of the Act prescribes that where the Permanent Account Number ("PAN"), i.e. tax identification number in India, is not furnished to the person responsible for deducting tax at source, the tax deductor would be required to deduct tax at the higher of the following rates, namely, at the rate prescribed in the relevant provisions of the Act; at the rate/rates in force; or at the rate of 20 percent.

The Pune Bench of the Income Tax Appellate Tribunal ("the Tribunal") has held that tax deducted at source ("TDS") on payments made to non-residents who did not furnish their PAN can be deducted as per the rate prescribed in DTAA and section 206AA of the Act cannot be invoked to insist on tax deduction at a rate of 20 percent.

- Facts of the Case

  The taxpayer engaged in the business of export of vaccines, made payments to non-residents for interest, royalties and fees for technical services. Tax was deducted on the said payments in accordance with the rates provided in DTAAs with the respective countries. However, the Assessing Officer ("AO") had noticed that in the case of some of the non-residents, the recipients did not have PANs. As a consequence, he treated such payments as cases of 'short deduction' of tax in terms of the provisions of section 206AA of the Act. Accordingly, demands were raised on the assessee for short deduction of tax and also for interest under section 201(1A) of the Act, being the difference between the rates prescribed in the Act and the actual tax rates deducted by the assessee.

  Aggrieved with the decision of the AO, the assessee filed an appeal before the CIT(A). The CIT(A) observed that section 206AA of the Act would override other provisions of the Act but not the provisions of section 90(2) of the Act. Therefore, he held that where a DTAA provides for a tax rate lower than that prescribed in section 206AA of the Act, the provisions of the DTAA would prevail.

  Aggrieved with the decision of the CIT(A), the Revenue filed an appeal before the Tribunal.

- Ruling

  It was held that Section 90(2) of the Act provides that the provisions of the DTAAs would override the provisions of the domestic Act in cases where the provisions of DTAAs are more beneficial to the assesse. Further, it would be quite incorrect to say that though the charging sections 4 and 5 of the Act dealing with ascertainment of total income are subordinate to the principle enshrined in section 90(2) of the Act but the provisions of Chapter XVII-B governing tax deduction at source are not subordinate to section 90(2) of the Act. Notably, section 206AA of the Act is not a charging section but is a part of a procedural provisions dealing with collection and deduction of tax at source. The provisions of section 195 of the Act which casts a duty on the assessee to deduct tax at source on payments to a non-resident cannot be looked upon as a charging provision.

  Therefore, where the tax has been deducted on the strength of the beneficial provisions of DTAAs, the provisions of section 206AA of the Act cannot be invoked by the AO to insist on tax deduction at the rate of 20 per cent, having regard to the overriding nature of the provisions of section 90(2) of the Act.

  Accordingly, it was held that the CIT(A) had correctly inferred that section 206AA of the Act does not override the provisions of section 90(2) of the Act and that in the impugned cases of payments made to non-residents, the assessee correctly applied the rates of tax prescribed under the DTAAs and not as per section 206AA of the Act because the provisions of the DTAAs are more beneficial. Thus, the ultimate conclusion of the CIT(A) in deleting the tax demands relating to the differences between 20 per cent and the actual tax rates on which tax was deducted by the assessee in terms of the relevant DTAAs was affirmed.

Raptakos Brett & Co. Ltd v. Deputy Commissioner of Income Tax (IT Appeal nos. 3317 Mum 2009 & 1692 Mum 2010)

- Background

  The Mumbai Bench of the Tribunal held that long-term capital losses on sale of shares liable to STT, where corresponding capital gains were exempt from tax under section 10(38) of the Act, can be set off against taxable long-term capital gains on sale of land in accordance with section 70(3) of the Act.

- Facts of the Case

  The assessee company, in its computation of income, had shown long-term capital losses on sale of shares and mutual fund units which had been set off against the long-term capital gains arising from sale of land. The AO held that the losses claimed could not be allowed to be set off since the income from long-term capital gains on sale of shares and mutual funds was exempt under section 10(38) of the Act.

  On appeal, the CIT(A) confirmed the action of the AO on the ground that exempt profits or losses are construed as separate species of income or loss and such exempt species of income or loss cannot be set off against the taxable species of income or loss.

  Aggrieved with the decision of the CIT(A), the assessee filed an appeal before the Tribunal.

- Ruling

  On second appeal before the Tribunal, it was held that, from the conjoint reading of the relevant sections of the Act, it can be seen that nowhere any exception has been made/carved out with regard to long-term capital gains arising on sale of equity shares. The whole genre of income under the head 'capital gain' on transfer of shares is a source, which is taxable under the Act. If the entire source is exempt or is considered not to be included while computing the total income, in such a case, the profit or loss resulting from such a source does not enter into the computation at all. However, if a part of the source is exempt by virtue of a particular 'provision' of the Act for providing benefit to the assessee, it cannot be held that the entire source will not enter into computation of total income. The concept of income including loss will apply only when the entire source is exempt and not in the cases where only one particular stream of income falling within a source is falling within exempt provisions. Section 10(38) of the Act provides exemption of income only from transfer of long-term equity shares and equity oriented funds and there are certain conditions stipulated for exempting such income. If such conditions are not fulfilled, the exemption is not given. Thus, the income contemplated in section 10(38) of the Act is only a part of the source of capital gains on shares and only a limited portion of source is treated as exempt and not the entire capital gains on sale of shares. Section 10(38) of the Act excludes in expressed terms only the income arising from transfer of long-term capital assets, being equity shares or equity funds which are chargeable to STT but not the entire source of income from capital gains arising from transfer of shares. It does not lead to exclusion of computation of capital gains on long-term capital assets or short-term capital assets being shares. Accordingly, long-term capital losses on sale of shares, where corresponding capital gains were exempt from tax under section 10(38) of the Act, would be allowed to be set off against taxable long-term capital gains on sale of land in accordance with section 70(3) of the Act.

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Indonesia

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Legislative developments

Income tax on life insurance savings benefits

It is a relatively common feature for life insurance products to contain a savings element. This is typically paid in addition to the policyholder's premiums (i.e. payment is made for the risk benefits and savings benefits). This may be redeemable by the policyholder at the end of the stipulated time period.

In this regard, any excess of the savings benefits redeemed over the initial premium paid was previously subject to 15% Indonesian withholding tax ("WHT") at the time of payment by insurers to policyholders under Circular No SE-09/PJ.42/1997 (issued by the Director General of Taxation).

Under the newly issued Directorate General of Taxation Circular Letter No. SE-56/PJ/2015, the abovementioned circular has been revoked. Accordingly, any excess of the savings benefits redeemed over the initial premium paid will be taxed at the level of the policyholder at the prevailing progressive individual income tax rates (i.e. 5% to 30% depending on the level of income earned).

Other developments

Multilateral Competent Authority Agreement

On 3 June 2015, the Multilateral Competent Authority Agreement ("MCAA") was signed by the Ministry of Finance of Indonesia at the Organisation for Economic Cooperation and Development ("OECD") Headquarters in Paris, France. Briefly, the MCAA is a multilateral instrument facilitating the Automatic Exchange of Information ("AEOI") using a Common Reporting Standard based on the Convention on Multilateral Administrative Assistance in Tax Matters signed by Indonesia on 3 November 2011 in Cannes, France. The first information exchange for Indonesia is intended to be conducted in September 2018.

To this end, the signing of the MCAA is evidence of Indonesia's commitment to promoting the global financial account information exchange, specifically concentrated in improving access to third parties' data, particularly banking data for tax purposes, and in supporting the Automatic Exchange of Financial Information, for detecting financial assets held offshore and potential harmful tax avoidance schemes.

~~In application, under the MCAA, the Indonesian Directorate General of Taxation will be able to access financial information of Indonesian citizens holding accounts offshore via the automatic exchange of information mechanism.~~

~~In light of the above, on the basis the 2015 Indonesian tax fiscal year has been highlighted as the 'year of guidance' whereby Indonesian taxpayers are encouraged to fulfil their tax compliance obligations, the implementation of the MCAA and the AEOI will place scrutiny on the taxpayer's financial assets in offshore tax jurisdictions in detecting potential harmful tax avoidance schemes.~~

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Japan

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Tax court cases summaries

Japanese Supreme Court decision – US (Delaware) limited partnership

On 17 July 2015, the Japanese Supreme Court rendered a decision declaring that a limited partnership formed under the laws of the state of Delaware ("Delaware LPS") should be treated as a corporation for Japanese tax purposes.

This Supreme Court decision had been much awaited for more than 2 years, as previous District Court and High Court decisions in Tokyo, Osaka and Nagoya have been split over the issue, as summarized below:

	District Court decisions	High Court decisions
Tokyo	Not a corporation (19 July 2011)	Corporation (13 March 2013)
Osaka	Corporation (17 December 2010)	Corporation (25 April 2013)
Nagoya	Not a corporation (14 December 2011)	Not a corporation (24 January 2013)

The Japanese government petitioned to appeal the decision reached by the Nagoya High Court that a Delaware LPS is not a corporation for Japanese tax purposes, pursuant to which the Supreme Court reversed the Nagoya High Court decision and ruled in favor of the government.

Although the taxpayers who lost in the Tokyo High Court and the Osaka High Court trials also appealed to the Supreme Court, the appeal applications were rejected.

- Criteria for determining whether a foreign entity should be treated as a corporation

  The Supreme Court determined in its ruling that the following steps should be used in determining whether a foreign entity should be treated as a corporation for Japanese tax purposes:

  [Step 1]

  Determine whether it is clearly beyond doubt, that legal status equivalent to that of a Japanese corporation is granted to the foreign entity under the laws of the country in which it was established, considering the provisions of such laws and the legal framework.

  In cases where Step 1 cannot be demonstrated beyond doubt, Step 2 may be used to reach a decision:

  [Step 2]

  Determine whether the foreign entity is an entity that assumes rights and obligations on its own account (i.e. whether the foreign entity itself can be a party to legal actions and whether the legal effects of the actions are attributable to such foreign entity).

- Judgment of a Delaware LPS based on the above criteria

  The Supreme Court concluded that a Delaware LPS should be treated as a corporation for Japanese tax purposes based on the above criteria as follows:

  [Step 1]

  i. The Delaware Revised Uniform Limited Partnership Act ("Delaware LPS Act") only provides that a limited partnership established under the Delaware LPS Act shall be a

'separate legal entity,' and hence it is not clearly beyond doubt on the basis of the Delaware LPS Act that it has legal status equivalent to that of a Japanese corporation.

ii. Further, even upon detailed review of the Delaware LPS Act and other related laws, it is not clearly beyond doubt that legal status equivalent to that of a Japanese corporation is granted to a Delaware LPS.

As the relevant legislation was determined not adequate to claim definitive proof for this Step, the Supreme Court thus proceeded to Step 2.

[Step 2]

i. The Delaware LPS Act provides that a limited partnership may carry on any lawful business, purpose or activity, whether or not for profit, with certain exceptions, and a limited partnership shall possess and may exercise all the powers and privileges granted by the Act or by any other law or by its partnership agreement, together with any powers incidental thereto.

ii. Considering the above provisions of the Delaware LPS Act, it is construed that the Act is based on the premise that a limited partnership is granted rights and powers to conduct legal actions under its own name and the effect of such actions is attributable to the limited partnership. This is consistent with a provision of the Act which provides that a partnership interest itself is personal property, a type of property right, and that a partner has no interest in specific underlying limited partnership property.

iii. In the light of the above provisions of the Delaware LPS Act, it is possible to say that a Delaware LPS itself can be a party to legal actions and the legal effects of the actions are attributable to the Delaware LPS. Thus, a Delaware LPS can be considered as an entity that has the ability to assume rights and obligations on its own account.

- Issues to be considered going forward

  In light of the above ruling, our first recommendation is that existing or contemplated structures involving investments via Delaware LPSs should be re-examined at the earliest opportunity.

  Additionally, this decision is the first Supreme Court decision that has indicated criteria to determine whether a foreign entity should be treated as a corporation for Japanese tax purposes; thus, for investments where the assumed tax treatment is derived based on assumptions on the Japanese tax treatment of certain offshore entities, it may be necessary to reassess whether such assumptions are still valid based on the criteria established by the ruling.

  Moreover, whether the Japanese tax authorities will release any practical guidance as a result of this decision should also be monitored going forward.

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Korea

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Legislative developments

Proposed 2015 tax revision pertaining to financial service industry

Netting sales and evaluation gain or loss from assets of funds during holding period

Under the current tax law, a qualified collective investment vehicle ("CIV") shall distribute dividend once or more each year, but evaluation gains on the invested assets such as shares, bonds, derivatives, etc. held by the CIV may need to be reserved during the operating phase of the investment. A new tax reform is proposed to reserve gains from sales of the invested assets during the operating phase so gains or losses from both evaluation and sales of the invested assets during the operating phase of the investment can be netted off and, therefore, only net gains will be taxed when exiting from the investment. The measures are to take effect with regards to distributions and net gains upon enforcement of the relevant tax law.

Exchange of financial account information between Korea and foreign contracting countries

Under the country-by-country agreement for exchange of financial information such as Foreign Account Tax Compliance Act ("FATCA"), financial institutions shall identify all personal information of non-residents, if required. Also financial institutions shall retain information of financial accounts until such financial accounts are classified as reporting financial accounts, starting from 1 January 2016. Also, if a financial institution is negligent in supervising individuals responsible for securing financial information subject to exchange with other contracting countries, it will be subject to penalties. This rule will be effective from 1 January 2016.

Reporting requirement for Korea over-the-counter trades

Under the tax reform proposal, financial institutions engaging in financial investment business shall be required to submit quarterly reports of Korea over-the-counter trade details of the shares transferred by individual customers to a jurisdictional tax office within one month after each quarter end, starting from 1 January 2016.

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Malaysia

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Taxation rulings and determinations

Tax audit framework 2015 - Finance and insurance
Tax audit framework 2015 - Withholding tax

The Malaysian Inland Revenue Board ("MIRB") has issued tax audit frameworks for the finance and insurance industries as well as for withholding tax, which are effective from 1 June 2015 and 1 August 2015 respectively.

The full texts of the frameworks are available at *http://www.hasil.gov.my*.

Public rulings

The MIRB has issued the following public rulings:

- 2/2015: Taxation of real estate investment trusts / property trust funds

  This Ruling explains the tax treatment accorded to an approved real estate investment trust or a property trust fund in Malaysia and replaces Public Ruling 9/2012: Taxation of Real Estate Investment Trusts / Property Trust Funds.

- 3/2015: Failure to furnish information within a stipulated period

  This Ruling explains the income tax treatment of a taxpayer who fails to furnish information within a stipulated period.

- 4/2015: Entertainment expense

  This Ruling explains the tax treatment of entertainment expense as a deduction against gross income of a business and steps to determine the amount of entertainment expense allowable as a deduction and it replaces Public Ruling 3/2008: Entertainment Expense.

- 5/2015: Taxation of a limited liability partnership

  This Ruling explains the tax treatment of a Limited Liability Partnership and replaces Public Ruling 3/2014: Taxation of Limited Liability Partnership.

- 6/2015: Qualifying expenditure and computation of capital allowances

  This Ruling explains the tax treatment in relation to qualifying expenditure on plant and machinery for the purpose of claiming capital allowances and computation of capital allowances for expenditure on plant and machinery. It replaces Public Ruling 2/2001: Computation of Initial and Annual Allowances in Respect of Plant & Machinery.

The full texts of the public rulings are available at *http://www.hasil.gov.my*.

MIRB's guidelines on tax treatment related to implementation of Malaysian Financial Reporting Standard 121 - The effects of changes in foreign exchange rates

The MIRB has issued guidelines to explain on the tax treatment related to the implementation of Malaysian Financial Reporting Standard 121 ("MFRS 121") or any other accounting standards with regards to the impact of foreign currency translation. MFRS 21 is equivalent to International Accounting Standard 21 ("IAS 21").

The full text of the guideline is available at *http://www.hasil.gov.my*.

MIRB's guidelines on tax treatment on single tier dividends and any income from an investment made out of a life fund in respect of a deferred annuity included in actuarial surplus transferred to shareholders fund

Actuarial surplus from a life fund transferred to a shareholders' fund is subject to tax. The MIRB has issued guidelines to provide a formula to determine the portion of the following exempt income forming part of the actuarial surplus transferred to the shareholders' fund which should be exempt from tax:

- single tier dividends; and
- income from the investment made out of a life fund in respect of a deferred annuity established in accordance with the Retirement Saving Standards approved by the Central Bank of Malaysia.

The above replaces the guidelines on *Tax Treatment on Single Tier Dividends Included in Actuarial Surplus of Life Fund Transferred to Shareholders' Fund*.

The full text of the guidelines is available at *http://www.hasil.gov.my*.

Other developments

Director General's decisions 5/2015 to 7/2015

The Royal Malaysian Customs Department ("RMCD") has uploaded various Director General's Decisions on the frequently asked Goods and Services Tax issues onto its portal (*http://gst.customs.gov.my*).

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Mauritius

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Legislative developments

Following the enactment of the Finance Act 2015, the following key tax measures have become effective:

Tax Deduction at Source ("TDS")

Interest received on debentures quoted on the stock exchange by a non-resident company is now exempt from TDS.

Corporate Social Responsibility ("CSR")

All existing CSR guidelines are revoked. However, entities have to disclose their CSR disbursements in their annual tax returns. CSR remains unchanged at 2% of prior year chargeable income.

Exempt income

The Government is keen to encourage the dispersed professional Mauritian community to return and serve their home country. In this respect, income derived from within or outside Mauritius by a member of the Mauritian Diaspora under the Mauritian Diaspora Scheme under the Investment Promotion Act will be exempt from income tax during the 10 succeeding income years as from the income year in which he returns to Mauritius.

Tax Administration

The Income Tax Act now includes a confidentiality provision to allow for exchange of information. This will enable Mauritius to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters developed jointly by the Organisation for Economic Cooperation and Development ("OECD") and the Council of Europe.

Taxation rulings and determinations

Tax Ruling 153 (TR 153)

TR 153 clarifies that the conversion of the capital portion of loan facilities into equity will not be subject to tax under the Mauritius Income Tax Act since it is a capital transaction.

Tax Ruling 154 (TR 154)

TR 154 confirmed that gains or profits from the sale of shares by a Category 1 Global Business Licence ("GBC 1") are exempt income by virtue of Second Schedule of the Income Tax Act. Expenses attributable to exempt income should be disallowed.

Tax Ruling 158 (TR 158)

Under TR 158, it was held that interest payable on convertible bonds will be an allowable expense, where the convertible bonds are used to fund operating and investing activities of the company. TR 158 further clarifies that dividend paid to preference shareholders is not cost incurred in the production of gross income and thus is not an authorised deduction.

Other developments

Mauritius-South Africa Double Taxation Avoidance Agreement ("DTAA")

The new treaty will become effective as from 1 January 2016. Some key features under the new DTAA are as follows:

- Dividend: 5% /10%
- Interest: Exempt/10%
- Royalty: 5%
- Capital gains on sale of shares: Taxing right to Resident State (except if the shares derive more than 50% of their value directly or indirectly from immoveable properties situated in the Other State)
- Residence of Company: Determined by Mutual Agreement

A Memorandum of Understanding ("MoU") has been signed on 22 May 2015 by the Mauritius Revenue Authority ("MRA") and the South African Revenue Service ("SARS") with a view to applying the Residence Article of the treaty governing companies. Factors laid down in the MoU will be considered by the MRA and SARS in determining whether a company is resident in Mauritius or South Africa.

Foreign Account Tax Compliance Act ("FATCA")

The MRA has issued a revised Guidance Note in May 2015 regarding the implementation of FATCA. The Guidance Note provides practical assistance to Mauritius Financial Institutions ("MFIs"), businesses, their advisors and officials dealing with the application of FATCA.

Reporting MFIs were required to make their first report by 31 July 2015 to the MRA. This deadline has been extended to 31 August 2015.

Smart City Scheme ("SCS")

The smart-city concept is about providing investors, nationals and foreigners with options for living in sustainable, convenient and enjoyable urban surroundings. The concept paves the way for investors to develop and invest in a mix of commercial, leisure and residential projects amongst others.

The Government of Mauritius has set up the SCS which provides attractive fiscal incentives to investors for the development of smart cities across the island. One of the main fiscal advantages is that the Smart City developers are exempt from income tax for the first eight years of operation as from date of issuance of the SCS certificate by the Board of Investment.

Individual Tax Filing for Year of Assessment 2015/2016

As reported in our last issue, further to the change in financial year end from 31 December to 30 June, there are exceptionally 2 filing deadlines for individual taxpayers in 2015.

A communiqué has been issued by the MRA on 25 August 2015 reminding individual taxpayers that they are required to file their returns for income derived from 1 January 2015 to 30 June 2015. The deadline for filing the return manually is 30 September 2015; if it is filed electronically, the deadline is 15 October 2015.

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New Zealand

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Legislative developments

Non-resident withholding tax on related party and branch lending

In May 2015, the New Zealand Inland Revenue and Treasury released an issues paper with proposals to address perceived deficiencies in New Zealand's non-resident withholding tax ("NRWT") rules. These proposals, if implemented, will directly affect financial institutions and their clients.

The problems identified by officials include the definition and recognition of income under the NRWT rules, "misuse" of the offshore and onshore NRWT exemptions and the robustness of the alternate 2% Approved Issuer Levy ("AIL"). The proposals include applying NRWT to financial arrangement income (rather than just interest paid), limiting AIL to loans from banks or where debt is raised from a group of 10 or more non-associated persons, and tightening the existing NRWT exemptions.

New Zealand's current and proposed taxing rights for business profits (before interest deductions and assuming that the transfer pricing and thin capitalisation rules are complied with) of foreign direct investment are:

Source and nature of funding to the extent that the business profits before interest are paid to the funder	Current tax law	Proposal
Resident lender	0%	10% NRWT
Non-resident associated funder by way of financial arrangement which is not money lent	2% AIL borne by borrower	2% AIL or 10% NRWT if associated under new rules (borne by borrower)
Non-resident non-associated lender of money lent	10% NRWT	10% NRWT with earlier payment if interest income does not match financial arrangement interest expenditure
Non-resident associated lender resident in a Double Tax Agreement ("DTA") country	28% corporate income tax on the margin	2% AIL or 10% NRWT on gross if not connected to the NZ branch. No change if connected to the NZ branch
Non-resident with New Zealand branch	28% corporate income tax on the margin (after foreign tax credit, if any)	28% corporate income tax on the margin 2% AIL or 10% NRWT on the offshore branch funding cost
New Zealand resident with offshore branch	28% corporate income tax on the margin (after foreign tax credit, if any)	28% corporate income tax on the margin 2% AIL or 10% NRWT on the offshore branch funding cost
Equity	28%	28%

There are further specific proposals for bank funding obtained through New Zealand branches.

KPMG in New Zealand has made submissions, with practical observations and stating KPMG's general and specific policy concerns. The submission can be found at *http://www.kpmg.com/NZ/en/IssuesAndInsights/ArticlesPublications/Tax-submissions/Documents/KPMG-Submission-NRWT-030715.pdf*.

Despite the policy concerns raised by KPMG, it seems clear that some changes to the current NRWT rules will proceed. This will impact all New Zealand businesses that have offshore debt funding from group entities. It will also potentially have material impacts on New Zealand subsidiaries' funding costs.

Draft legislation which contains decisions on the submissions made is expected to be introduced in March 2016. Financial institutions should pay particular attention to its requirements.

Goods and Services Tax on imported services, intangibles and low-value goods

In mid-August 2015, the New Zealand Government released proposals to collect Goods and Services Tax ("GST") on imported services and digital content.

The proposals are intended to ensure GST neutrality between offshore and New Zealand businesses selling to local consumers. There is an obvious concern regarding additional revenue foregone by the Government in an increasingly digitally connected world.

The proposals follow the approach proposed by the Organisation for Economic Cooperation and Development ("OECD") for taxing cross-border services and intangibles. Offshore suppliers of services and digital content will be required to register in New Zealand and charge and collect the GST.

Financial institutions generally provide exempt services which would not be within these rules. However, some financial institutions' services, for example, insurance or investment advice, may be covered.

The current NZ$400 threshold for collecting GST on imported goods is also being reviewed. The Government has asked New Zealand Customs to report, by October 2015, on practical options for collecting GST on importation of low-value goods. KPMG in New Zealand believes the likely outcome is a reduced threshold (similar to Australia) and requiring foreign suppliers of goods to register and collect GST (similar to the services proposal).

Financial institutions may also find that they are required to assist Inland Revenue with enforcement of the rules by providing transaction information to Inland Revenue. This will come at a cost for which no compensation is likely to be received.

Submissions on the proposals were due by 25 September 2015.

Budget 2015 property tax changes introduced

As part of its May Budget 2015, the Government announced it would:

1. Collect IRD number and tax information from property buyers and sellers;
2. Tax residential land (other than the main home) bought and sold within 2 years (the "bright-line" test);
3. Consider a withholding tax for non-resident sellers.

Draft legislation on the new disclosure requirements (item #1) was introduced on 22 June 2015 and has recently been through New Zealand Parliamentary select committee scrutiny. Under the new disclosure requirements, buyers and sellers of property (other than their main home) will need to provide a New Zealand IRD number. Non-residents will also need to provide their home country tax identification number and have a New Zealand bank account to get a New Zealand IRD number. This is designed to ensure that New Zealand's Anti Money Laundering rules apply and the New Zealand Inland Revenue has additional information on property transactions.

The Government introduced a Tax Bill containing the 2 year "bright-line" test (item #2) on 24 August 2015, following consultation on the design of the test. Unfortunately, the draft legislation has not taken into account the various concerns raised by KPMG (and others) during consultation in June and July[1]. This includes the quarantining of losses and potential restrictions on deductibility of property holding costs, such as interest costs. KPMG expects the Bill to be referred to select committee, for consideration. This may provide another opportunity to address these concerns.

The new disclosure and "bright-line" test apply for property acquired on or after 1 October 2015.

On 31 August 2015, the Government released a consultation paper on a withholding system for non-residents (item #3). Under the draft proposal, a withholding tax will apply to non-resident sellers who are subject to the "bright-line" test above, from 1 July 2016. The proposed rate of withholding will be the lesser of 33% of any gain and 10% of the agreed sales price. Submissions on the proposal were requested by 2 October.

Taxation (Transformation: First Phase Simplification and Other Measures) Bill introduced

The 30 June Tax Bill contains:

- Changes to support the Government's Making Tax Simpler proposals for Inland Revenue (see last update) by enabling electronic communications with taxpayers and information sharing between Government agencies in a greater range of circumstances.
- New rules for collecting tax on employee share scheme benefits. From 1 April 2017, employers will be able to deduct tax on benefits employees receive from employee share schemes under the Pay As You Earn ("PAYE") regime. Currently, employees are responsible for meeting their tax obligations on employee share benefits.

Cases

Commissioner of Inland Revenue v TrustPower Limited [2015]

In June 2015, the New Zealand Court of Appeal ruled that expenditure incurred by TrustPower in applying for resource consents for four electricity generation projects was capital expenditure. TrustPower had successfully argued in the High Court that the expenditure was revenue "feasibility" expenditure and therefore deductible for tax purposes. The New Zealand Inland Revenue successfully appealed the High Court decision.

The decision has potentially significant implications for the deductibility of expenditure incurred to determine the feasibility of a project, including Inland Revenue's own published view on feasibility costs.

It is unclear whether TrustPower Limited intends to appeal the decision of the Court of Appeal to the New Zealand Supreme Court.

Taxation rulings and determinations

Base Erosion and Profit Shifting Action Plan ("BEPS") and international tax reform

In the January to March 2015 update, it was noted that the key areas of New Zealand's BEPS focus were:

1. NRWT on related party debt – Address problems with the application of NRWT on interest on related party debt;
2. Interest limitation rules – Consideration of New Zealand's interest limitation rules in light of the OECD's recommendations; and
3. Hybrids – Consideration of hybrid instruments and entities in light of the OECD's recommendations.

Item #1 was discussed in this update. For items #2 and #3, the final OECD recommendations are due October 2015. New Zealand's response to those recommendations is expected to be by

[1] For details, please visit *http://www.kpmg.com/NZ/en/IssuesAndInsights/ArticlesPublications/Tax-submissions/Documents/150724KPMGSubProperty.pdf*.

way of consultative documents to be released in 2016 rather than late 2015 as originally expected.

Other developments

New Zealand – Canada DTA in force

From 1 August 2015, the withholding tax rate on:

- Dividends is 5%, where the shareholder is a company that holds more than 10 percent shareholding in the dividend payer (previously 15%), and 15% for other dividends.
- Interest is 10% (previously 15%).
- Royalties on copyright and other specified items is 5%, and 10% for royalties generally (previously 15%).

Other changes will take effect from 1 April 2016 (for New Zealand) and 1 January 2016 (for Canada).

New Zealand – Samoa DTA signed

In July 2015, New Zealand concluded a DTA with Samoa, being the first of its kind. The DTA is yet to come into force however.

IFRS 9 Financial Instruments

On 24 July 2014, the International Accounting Standards Board ("IASB") issued the 4th and final version of its new standard on financial instruments accounting – IFRS 9 Financial Instruments. The new standard includes revised guidance on the classification and measurement of financial assets and financial liabilities, impairment and supplements the new hedge accounting principles published in 2013.

IFRS 9 has a mandatory effective date of 1 January 2018. Earlier adoption is also permitted. IFRS 9 is to be applied retrospectively but comparatives are not required to be restated. If an entity elects to early apply IFRS 9, it must apply all of the requirements at the same time.

Generally, IFRS 9 applies to all entities. But financial institutions and other entities with large portfolios of financial assets measured at amortized cost or FVOCI (fair value through other comprehensive income) will be the most affected and in particular, by the ECL (expected credit losses) model.

Adoption of the new standard may also have effects on a financial institution's tax position in New Zealand. The timing of income and deductions is, unless appropriate elections and adjustments are made, consistent with their recognition for financial reporting purposes.

Financial institutions' assessment of the effects of the new standard needs to consider the effects on their tax position. IFRS 9 may affect elections they have made or are able to make, as well as their projections of taxable income and deductible expenses.

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Philippines

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Taxation rulings and determinations

Bureau of Internal Revenue Ruling No. 209-15 dated 19 June 2015

In compliance with the Revenue Memorandum Circular ("RMC") No. 8-2014 (Presentation of Tax Exemption Certificate or Ruling by Exempt Individuals and Entities), the Social Security System ("SSS") requested a Certification or Ruling that it is exempt from the payment of 20% final tax on the interest and income earned from its investments in various instruments or securities like bonds, notes, and other commercial papers issued by private/government corporations and other financial institutions.

Section 16 of Republic Act ("RA") No. 1161, as amended by RA No. 8282 (Social Security Act of 1997) provides that the SSS and all its assets and properties, all contributions collected, all accruals thereto and income or investment earnings therefrom, as well as all supplies, equipment, papers or documents shall be exempt from any tax, assessment, fee, charge, customs or import duty. The tax exempt status of SSS was further reiterated in Section 27(C) of the Tax Code which exempts the SSS from payment of tax upon their taxable income.

Based from the foregoing, the interest and other income earned by the SSS from its investments in various instruments or securities (like bonds, notes and other commercial papers issued by private/government corporations and other financial institutions) shall not be subject to tax (including creditable and final withholding taxes).

Other developments

Securities and Exchange Commission policy on issuance of securities of a mutual fund company apart from its authorized capital stock

Sun Life Asset and Management Company ("SLAMC") requested a legal opinion from the Securities and Exchange Commission ("SEC") that will allow SLAMC, a mutual fund, to sell securities other than shares of its own authorized capital stock pursuant to the Investment Company Act ("ICA") of 1990 vis-à-vis the Implementing Rules and Regulations ("IRR") of the said law (ICA Rule 35-1, as amended).

The SEC considers that it is necessary to relax its stringent policy of restricting mutual funds to only sell its own shares, and it is now the policy of the SEC to allow mutual funds to sell securities other than shares of its own authorized capital stock based on the following grounds:

- Under the ICA, securities encompasses different kinds of securities, of which "shares of stocks" are just a specific form of securities. On the other hand, under the Securities and Regulation Code ("SRC"), the term "securities" encompasses a broad scope, i.e. aside from the shares of stock, there are other forms of securities. Hence, the use of the term "security" cannot be confined to "shares of stock" alone but must likewise refer to other kinds and forms of securities pursuant to the ICA in relation to the SRC;
- Issuance of securities other than its own shares of stock is supported and recognized by the ICA and ICA Rule 35-1;
- ICA Rule 35-1 complements the ICA; nothing in the said rules would indicate any restriction in the sale of other securities;
- It was noted that mutual funds and other forms of Collective Investment Schemes ("CIS") have now been thriving in the country. The increasing amount of assets under management and the growing number of investors are proof of the growing industry. However, as shown

in the data of other Association of Southeast Asian Nations ("ASEAN") countries, there is much room for further growth of the mutual fund industry in the country. The importance of a supportive policy environment was underscored in several studies. Commitment of the government to support the development of the mutual fund market is needed to ensure stability and consistency of regulation. The current strong macroeconomic fundamentals, which have been recognized by an upgrade in credit rating, coupled with optimistic growth forecasts, bode well for the prospects of the mutual fund market. With higher incomes, a corresponding increase in demand for investment products is expected. Improving the regulatory environment for mutual funds and other forms of CIS can help increase investor confidence in the industry. To prepare for this growth opportunity, the establishment of a favorable regulatory framework where companies can operate to facilitate the flow of investments, and at the same time broaden investor participation, is necessary.

Thus, the SEC considers that it is necessary to relax such regulatory requirements pursuant to its rule-making power under Section 5(g) of the SRC and will allow SLAMC and other mutual funds to sell securities other than its own shares.

Executive Order ("EO") No. 184

EO No. 184 promulgates the Tenth Regular Foreign Investment Negative List ("FINL") issued by the Office of the President on 29 May 2015.

The FINL covers the areas or activities reserved 100 percent to Filipino nationals as mandated by the Philippine Constitution and other laws, as well as those areas which are partly nationalized wherein foreign investors are allowed to participate to a certain extent. The Tenth Regular FINL has substantially adopted the Ninth Regular FINL.

The EO reiterates that lending companies regulated by the SEC are allowed to have up to 49% foreign equity participation (Sec.6 of RA 9474). Financing companies and investment houses regulated by SEC are allowed to have up to 60% foreign equity participation (Sec. 6 of RA 5980 as amended by RA 8556; Presidential Decree ("PD") 129 as amended by RA 8366). Full foreign participation is allowed through financial or technical assistance agreement with the President (Art. XII, Sec. 2 of the Constitution).

2015 Securities Regulation Code Rules ("2015 SRC Rules")

The SEC issued the 2015 Implementing Rules and Regulations of the Securities and Regulations Code or the "2015 SRC Rules" dated 4 August 2015.

In a Press Release, the SEC summarized the salient features of the 2015 SRC Rules as follows:

- **Shelf registration** is expanded. Under a shelf registration program, securities to be issued in tranches may be registered for an offering to be made on a continuous or delayed basis for a period not exceeding 3 years.
- **Commercial paper** is now simply defined as evidence of indebtedness of any person with a maturity of 365 days or less. The new rules ceased using the terms of long term commercial paper and short term commercial paper. Selling commercial paper is also made easier with the requirement of an issuer rating instead of a separate rating for each issuance.
- **A new category of exempt security is introduced.** This involves securities issued or guaranteed by multilateral financial entities ("MFEs") established through a treaty or binding agreement to which the Philippines is a party.
- **Public offerings which have a limited character** are also exempt from registration. Such offerings will be exempt as long as the covered securities are available only to the parties or persons named in the application for exemption for a specified period. An example of this are the employee stock option plans ("ESOPs") issued by a corporation to its eligible employees.
- **Underwriters** are no longer required to underwrite securities solely on a firm commitment basis. They can agree on a different plan of distribution with the issuing company subject to the approval by the SEC. However, as a general rule, issuers of registered securities, except issuers of proprietary/non-proprietary membership certificates or shares, are still required to enter into an underwriting agreement with an investment bank or investment house.
- **Extension of the period to sell securities.** The period to sell securities subject of registration statement is extended from 2 days to 10 business days from the date of the effectivity of the registration statement.

- **Relaxed requirements for qualified buyers.** The financial capacity of individuals to qualify as a qualified buyer has been reduced from an annual gross income of PHP 25 million to PHP 10 million. Any verifiable document may now be submitted to prove financial capacity. Income tax return is optional.
- The mandatory **tender offer** rules have also been given a facelift. The new rules now provide for two levels of action, depending on the threshold triggered: (a) a disclosure action; and (b) mandatory tender offer action. The rules also provide a set of guidelines in the conduct of valuation and issuance of fairness opinion.
- The SEC added that it has adopted a policy to extend the effectivity of financial statements from 135 to 180 days to align with the ASEAN standard as part of ASEAN market integration. Such policy will be formalized as part of the amended **SRC Rule 68** (Special Accounting Rules) which shall be released separately at a later date. In the meantime, Issuers can make use of this extension by filing a request for exemptive relief with the SEC.

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Singapore

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Taxation rulings and determinations

Extension of the Enhanced-Tier fund tax incentive scheme

Following the Budget 2015 announcement as covered in the previous issue, the Monetary Authority of Singapore ("MAS") has, on 29 May 2015, released further details on the tax changes concerning the extension of the Enhanced-Tier fund tax incentive scheme ("Section 13X Scheme").

The Section 13X Scheme grants tax exemption to approved fund vehicles on specified income derived from designated investments, subject to meeting all the relevant conditions under the scheme. The Section 13X scheme was also extended to regard master and feeder funds as one fund vehicle structure. Where the feeder funds invest solely in the master fund and the feeder funds do not trade, the fund structure as a whole can submit a consolidated tax incentive application and will only need to meet one set of economic conditions[2].

From 1 April 2015, both master-feeder-special-purpose vehicle ("SPV") and master-SPV fund structures would be able to submit a consolidated tax incentive application and meet the economic conditions on a collective basis under the latest enhancement.

In order to do so, such fund structures must satisfy all of the following conditions, in addition to the existing qualifying conditions under the Section 13X Scheme:

- The master fund must be a Singapore incorporated / constituted / registered entity (as the case may be) and is regarded as a Singapore tax resident;
- The master fund can hold up to two additional tiers of SPVs, provided the SPVs are set up as companies and are wholly owned by the master fund; and
- The economic commitments have to be met on a multiple-fold basis.

Addition of SPVs

Subsequent to the approval of the master-feeder-SPV or master-SPV fund structure, any addition of SPV(s) must be approved by the MAS. In addition, the fund structure would need to ensure that the new economic commitments on a multiple-fold basis are met at the point the SPVs are added.

Failure to meet specified conditions

When the fund structure fails to satisfy the specified conditions under the Section 13X Scheme for any basis period, all the entities under the fund structure would not enjoy tax exemption on specified income from designated investments for that Year of Assessment relating to the basis period concerned.

When an entity fails to satisfy the conditions permanently (e.g., if an SPV is no longer wholly owned), the MAS would need to be given advance notice of that entity's withdrawal from the Section 13X Scheme. With the withdrawal, the economic conditions of the Section 13X fund

[2] Minimum fund size of S$50 million at point of application and incurs at least S$200,000 in local business spending in each basis period relating to any Year of Assessment on a consolidated basis for such master-feeder fund structure. Real estate, infrastructure and private equity funds can recognize committed capital towards meeting the minimum fund size requirement of S$50million (conditions apply).

structure would be revised downwards accordingly.

Submission of Annual Returns and Annual Declaration

A master-feeder-SPV or master SPV fund structure approved under the Section 13X Scheme would only need to submit a single tax return to the Inland Revenue Authority of Singapore (where no taxable income is derived) and a consolidated annual declaration online to the MAS within 4 months from the end of the fund structure's financial year end.

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Taiwan

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Legislative developments

Amendment of the Merger and Acquisition Act

The Merger and Acquisition Act ("M&A Act") has been recently amended. One of the key amended areas is the relaxation of the restriction on the types of consideration that can be used in spin-off and share swap transactions. Furthermore, the duration of prior year losses that can be carried over to the surviving entity or spun-out entity in merger or spin-off transactions have been increased from 5 years to 10 years. The aforementioned changes are as follows:

1. Under the amended M&A Act, in order for a spin-off transaction to qualify for the various transfer tax exemptions under Article 39 (previously Article 34), at least 65% of the consideration paid in connection with the spin-off would need to be voting shares.
2. While the M&A Act provides income tax relief for horizontal spin-off, however, under the amended relevant Article (Article 44, previously Article 39), in order for a spin-off transaction to qualify for the said income tax relief, at least 80% of the consideration paid in connection with the spin-off would need to be voting shares.
3. The loss-carry-forward period for the prior losses inherited by the surviving company in a merger transaction or the company acquiring the asset/business in a spin-off transaction has been extended from 5 years to 10 years in order to be consistent with the relevant rule under Income Tax Act.

The aforementioned amendment will become effective as of 8 January 2016.

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Vietnam

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Legislative developments

New circular on factoring activities of credit institutions and foreign bank branches

On 17 July 2015, the State Bank of Vietnam ("SBV") issued Circular 09/2015/TT-NHNN dated 17 July 2015 on factoring by credit institutions and foreign bank branches, which took effect from 1 September 2015.

According to Circular 09, credit institutions or foreign bank branches may carry on factoring business if they are licensed to do so and have a bad debt ratio of less than 3%. Factoring must be conducted in Vietnam Dong unless the loan receivables are sold to a non-resident.

Circular 09 also prescribes the content of a factoring contract.

Amendment and supplements to regulations on securities

On 26 June 2015, the Vietnam government issued Decree 60/2015/ND-CP supplementing and amending a number of articles of Decree 58/2012/ND-CP on securities, which took effect from 1 September 2015.

The most notable amendment is the removal of 49% cap on foreign ownership in public companies with the below exceptions:-

- Where international tax treaties in which Vietnam is a member contain provisions on foreign ownership ratio, such a regulated ratio will apply.
- Where public companies operate in business lines and industries to which investment laws and relevant laws regulating the foreign ownership ratio apply, the provisions under those laws will apply.

  If they are subject to conditions applied to foreign investors but there is no specific regulation on the rate of foreign ownership, the maximum rate will be 49%.
- Where public companies operate in several business lines and industries with different provisions on foreign ownership ratio, the foreign ownership ratio will not exceed the lowest ratio applicable to the business lines and industries (in which such companies operate) for which there are provisions on foreign ownership unless otherwise provided under international treaties.

In addition, Decree 60 allows unlimited investment by foreign investors in government bonds, government-guaranteed bonds, local government bonds and corporate bonds, unless otherwise provided by applicable laws or the bond issuers. It is noteworthy that, for convertible bonds, the issuers must ensure that the foreign ownership ratio upon conversion into shares or upon the purchase of shares will be in compliance with the provisions on the foreign ownership restriction.

Foreign investors may also invest without restrictions in securities investment fund certificates, shares of securities investment companies, non-voting shares of public companies, derivative securities and depository receipts, except that for an open-end fund, a securities investment fund that has a rate of foreign ownership equal to more than 51%, the rate of foreign ownership must conform to statutory conditions and procedures applied to foreign investors that contribute capital, buy securities or paid-in capital of economic organizations.

New decree on derivatives

On 5 May 2015, the Vietnam government issued Decree 42/2015/ND-CP providing guidance on derivatives and derivatives market, which is considered a big step for the Vietnam government in providing a legislative environment for this emerging and complex market. This Decree took effect from 1 July 2015.

Decree 42 recognises both listed and over-the-counter ("OTC") derivative securities. Derivative products covered under this Decree include:

- future contracts;
- listed options;
- forward contracts with underlying assets being securities traded on the stock exchange; and
- other listed and OTC derivative securities with underlying assets being listed securities.

Decree 42 also governs the qualified participants in the derivatives market (i.e. criteria for participating in derivatives market such as charter capital level, number of staff qualifying for the practice certificates, and their rights and obligations).

There are areas that were left unclear or were not provided on. It is expected that the competent authorities will provide more guidelines, such as the use of trading accounts of foreign investors. This Decree does not mention if foreign investors can use their indirect investment capital accounts for trading derivative securities.

From a tax perspective, there would be a risk that losses from trading of derivatives are not deducted in calculating Corporate Income Tax if the trading of derivatives is not carried out in accordance with the licensed activities.

Apart from the above new regulations, the following Circulars providing more details in the implementation of Decrees and Laws were recently issued:-

- Circular No. 05/2015/TT-NHNN dated 4 May 2015 ("Circular 05") guiding credit institutions ("CIs") in collaboration with the Credit Guarantee Fund ("CGF") in providing loans with guarantee of the CGF in accordance with Decision No.58/2013/QD–TTg dated 15 October 2013 – effective from 18 June 2015

  Under Circular 05, a Memorandum of Understanding ("MOU") and/or a specific agreement between the lenders (e.g. CIs) and the CGF should be in place prior to offering any secured loans to the borrowers. In addition, some compulsory contents in these MOU and/or specific agreements are also provided in Circular 05. Circular 05 also provides detailed guidance on principles in offering secured loans by CIs, implementing the guarantee obligations by CGF, and handling of guaranteed assets.

- Circular 06/2015/TT-NHNN ("Circular 06") as a remedy to reinforce the statutory limit on shareholdings by individuals and/or institutional shareholders – effective from 15 July 2015

  The SBV in its Circular 06 provides a timeline and procedures for CIs to draw out a remedial plan to ensure the conformity with the permitted limit on the shareholdings ratio as prescribed in Article 55 of the Law on Credit Institutions.

  It also imposes harsh penalties on non-compliant shareholders, including suspending dividend rights and rights to serve on the board of directors.

- Circular 08/2015/TT-NHHH ("Circular 08") providing amendments and supplementing some provisions of Circular No.40/2011/TT-NHNN ("Circular 40") on the licensing procedures in obtaining licences for foreign institutions having banking activities in Vietnam – effective from 13 August 2015.

  Circular 08 sets out the process for banks to apply for additional activities (e.g. interest rate swaps and depository services).

Taxation rulings and determinations

Further guidance of SBV to financial institutions and branches of foreign banks ("FIs") on implementation of Foreign Account Tax Compliance Act ("FATCA")

SBV issued the Official Letter No. 1882/TTGSNH11 ("OL 1882") on 17 June 2015 providing further guidance to FIs on implementation of FATCA after registration of Global Intermediary Identification Number ("GIIN") with Internal Revenue Service ("IRS").

According to OL 1882, key agreements have been reached between Vietnam and the US relating to the negotiation of the Intergovernmental Agreement Model 1B ("IGA").

The IRS grants an additional extension of time to file the reports in accordance with FATCA as follows:

- The deadline to file the hard copies of reports in accordance with FATCA will be extended for an additional 90 days from 29 June 2015. In order to be entitled to this extension, FIs are required to submit request forms for extension to the IRS no later than 29 June 2015;
- The IRS shall allow a waiver for filing reports electronically to FIs, which have not reported according to FATCA yet. In order to be entitled to this waiver, FIs are required to submit request forms for waiver no later than 13 August 2015.

Accordingly, SBV's Banking Supervisory Agency hereby requests FIs with GIIN:

- Not to report to the IRS on the reporting deadline (29 June 2015);
- To submit the request form for an additional extension of time to file the report for tax year 2014 and request for waiver from electronic filing to the IRS as of the aforementioned deadlines in order to be eligible for reporting extension and electronic filing waiver.

It is also noted that all branches of foreign banks in Vietnam are not allowed to directly report to their parent banks or partners prior to the approval of SBV's Governor.

The OL 1882 also provides temporary guidance on the reporting format to FIs.

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