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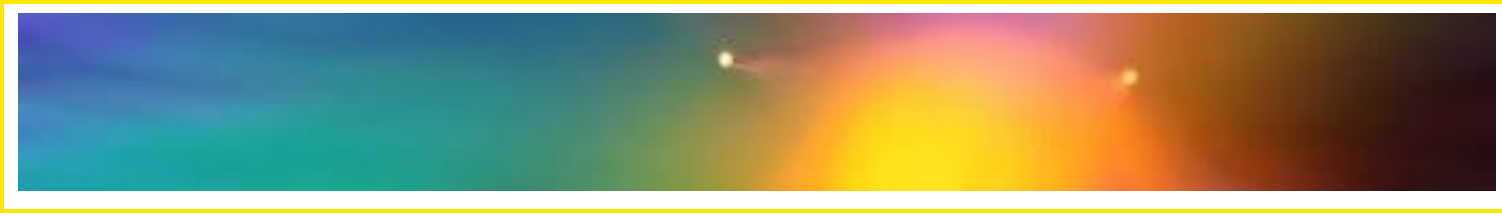
Malaysian developments

Public Ruling (PR) No. 3/2022 – Taxation of Foreign Fund Management Company

A foreign fund management company is a company incorporated in Malaysia and licensed under the Capital Markets and Services Act 2007 (CMSA). The Inland Revenue Board (IRB) has published PR No. 3/2022: Taxation of Foreign Fund Management Company, dated 29 July 2022. This new 21-page PR replaces PR No. 7/2019, which was issued on 3 December 2019 (see *Tax Alert No. 23/2019*). The new PR comprises the following paragraphs and sets out six examples:



Similar to the earlier PR, the new PR explains the tax treatment of income received by a foreign fund management company that provides fund management services to foreign and local investors. The PR is, however, not applicable to a foreign fund management company that issues, offers or makes an invitation to subscribe or purchase units in conventional unit trust funds.

The new PR is broadly similar to the earlier PR, with some of the key changes outlined below.

- The PR was updated to reflect the income tax exemptions provided pursuant to:

  (i) Income Tax (Exemption) (No. 7) Order 2021
  The Order provides that a company is exempted from tax on the statutory income derived from the business of providing fund management services to local investors in Malaysia, from the year of assessment (YA) 2021 to YA 2023.

  The exemption is provided on condition that the company obtains an annual certification from the Securities Commission Malaysia (SC) that the following conditions have been fulfilled:
  (a) The company provides fund management services to local investors in Malaysia in accordance with *Shariah* principles.
  (b) The company has at least two full-time employees in Malaysia, with one of the employees holding a Capital Markets Services Representative Licence under the CMSA
  (c) The company incurs annual operating expenditure of at least RM250,000 in Malaysia.

  Other conditions apply.

  (ii) **Income Tax (Exemption) (No. 8) Order 2021**
  The Order provides that a company is exempted from tax on the statutory income derived from the business of providing fund management services to foreign investors in Malaysia, from the YA 2021 to YA 2023.

  The exemption is provided on condition that the company obtains an annual certification from the SC that the following conditions have been fulfilled:
  (a) The company provides fund management services to foreign investors in Malaysia in accordance with *Shariah* principles.
  (b) The company has at least two full-time employees in Malaysia, with one of the employees holding a Capital Markets Services Representative Licence under the CMSA.
  (c) The company incurs annual operating expenditure of at least RM250,000 in Malaysia.

  Other conditions apply.

- The PR was also updated to reflect the new guidelines and documents issued by the SC on the establishment of fund management companies in Malaysia.

Case law on whether there was wilful default or negligence under Section 91(3) of the Income Tax Act 1967 (ITA)

In *Idaman Harmoni Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2022) MSTC 30-489*, the High Court (HC) overturned the decision of the Special Commissioners of Income Tax (SC) and delivered a judgment in favour of the taxpayer. Following the

precedent in *Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473*, the HC held that the burden lies on the Director General of Inland Revenue (DGIR) to prove wilful default or negligence under Section 91(3) of the ITA. The HC found that based on the facts of the case, as the DGIR had failed to prove that there was wilful default or negligence by the taxpayer, the notices of assessments made outside the time-bar period were to be discharged.

An overview of the case and discussion of the issues are set out below.

Overview

The chronology of events are as follows:

3 June 2003	The taxpayer purchased three plots of land.
23 April 2004	The taxpayer entered into a Development Agreement (DA) with IJM Properties Sdn Bhd for the construction and development of commercial and residential units on the lands. Subsequent to entering the DA, the taxpayer submitted a real property gains tax (RPGT) return (CKHT 1 Form) along with a copy of the DA to the DGIR in respect of the joint venture (JV) transaction in 2004.
30 June 2006	The parties to the DA entered into a Supplementary Agreement. Under the agreements, it was agreed that the taxpayer would be entitled to certain units from the development.
2009	The development on the lands was completed, and the taxpayer received his units.
	The taxpayer rented out his units and brought the rental income to tax under Section 4(a) of the ITA for the years of assessment (YAs) 2009 and 2010.
3 December 2015	Pursuant to an audit conducted in 2014, the DGIR informed the taxpayer's tax agent that the DA was a trading transaction which was taxable under the ITA. Based on the circumstances, the DGIR was of the view that they were not barred from pursuing the matter under Section 91(1) of the ITA by invoking Section 91(3), as there was at the very least the element of negligence, if not wilful default, on the taxpayer's part.
2016	The DGIR issued notices of assessment for YAs 2009 and 2010 to the taxpayer.

As the taxpayer did not agree with the assessments, the taxpayer filed an appeal to the SC. The SC held in favour of the DGIR and affirmed the notices of assessment raised by the DGIR. The taxpayer appealed the SC's decision to the HC.

The issues for the HC's determination were whether the DGIR could invoke Section 91(3) to issue the notices of assessment to the taxpayer for YAs 2009 and 2010, and whether there was any wilful default or negligence on the taxpayer's part.

The HC held that based on *Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473*, the burden lies on the DGIR to prove wilful default or negligence under Section 91(3). In terms of wilful default, the DGIR had to prove that the taxpayer had failed to exercise care in completing the CKHT 1 Form

and that the taxpayer had known that he was committing and intended to commit a breach of his duty. Alternatively, the DGIR had to prove that the taxpayer was recklessly careless in the sense of not caring whether his act or omission was a breach of his duty. In terms of negligence, the DGIR would have to prove that the taxpayer had failed to exercise the degree of care that someone of ordinary prudence would have exercised under the same circumstances.

In this case, the HC found that the taxpayer could only be said to have committed wilful default if he did not furnish the DA to the DGIR, or if it could be established that the declared value of RM31 million in the CKHT 1 Form was not reflective of the actual market value of the lands at the material time. The HC also found that the taxpayer could not be said to have been negligent as the DGIR could not prove that there was any failure to provide any other information required by the CKHT 1 Form. In addition, the failure of the DGIR to challenge the CKHT 1 Form submitted (if they were of the view that the taxpayer was not entitled to the RPGT exemption granted under P.U.(A) 170/2003) further diluted the DGIR's argument that the taxpayer had committed wilful default or negligence within the meaning of Section 91(3).

The HC also disagreed with the SC's position that the taxpayer together with some of its shareholders (i.e., Mega First Corporation Berhad (MFCB) and Gombak Land Sdn Bhd (Gombak Land))[1] had entered into a scheme to avoid tax under the ITA, and that a wilful default existed since it was always the intention of the taxpayer to dispose of the lands for profit. The HC held that unless one of the exceptions to the *Salomon* doctrine applies, it cannot be assumed that the taxpayer is a property developer for the purpose of the ITA by virtue of its holding companies being developers. In view that they are separate and distinct entities, the fact that Gombak Land owns 65% of the taxpayer company does not make the taxpayer a developer too.

In conclusion, based on the facts of the case, the HC held that as the DGIR had failed to prove that there was wilful default or negligence by the taxpayer, the notices of assessment made outside the time-bar period were to be discharged.

Overseas developments

Indian Tax Administration mandates non-resident taxpayers to furnish information electronically to avail Double Taxation Avoidance Agreements benefits

On 16 July 2022, the Indian Tax Administration (ITA) issued a notification mandating non-resident (NR) taxpayers to electronically furnish specific information in specified form (Form 10F) to avail Double Taxation Avoidance Agreements (DTAA) benefits. This may effectively require NR taxpayers to obtain an Indian Tax Identification Number (PAN), register on the Income Tax E-filing Portal (Portal) and file Form 10F electronically.

The notification comes into force immediately and the NR taxpayers can electronically file Form 10F for the Fiscal Year (FY) 2021/22.

Detailed discussion

Background

The Income Tax Laws require an NR taxpayer to provide a Tax Residency Certificate (TRC) to avail DTAA benefits. NR taxpayers are required to furnish additional documents and information in Form 10F if certain prescribed details are not available in the TRC.

[1] MFCB and Gombak Land are both property developers. MFCB owns 100% of Gombak Land, which in turn owns 65% of the taxpayer company.

Presently, the NR taxpayers provide the TRC and Form 10F either in physical or electronic copy to the payer of income to avail DTAA benefits at the time of withholding. Taxpayers are not required to file the TRC and Form 10F along with the tax returns. These documents are retained by the taxpayers and furnished to the ITA upon request or during a tax audit.

Current notification

The ITA has now issued a notification that requires NR taxpayers to electronically file Form 10F on the Portal. The TRC is also required to be attached when e-filing Form 10F.

The notification is effective immediately and the Portal allows filing of Form 10F for the FY 2021/22. For subsequent FYs, filing may be done as permitted by the Portal.

Implications

While the notification addresses a long-standing question on the mode of furnishing Form 10F and the TRC by the NR taxpayers to the ITA, it also creates compliance requirements and practical challenges. NR taxpayers may be required to obtain a PAN (which may not be mandatory otherwise in all cases) and register on the Portal, to be able to electronically file Form 10F.

Several representations are presently being made to the ITA to alleviate the practical difficulty caused for NR taxpayers due to the mandatory e-filing of Form 10F. Clarity is also anticipated on the filing methodology for subsequent FYs. However, NR taxpayers should evaluate the impact of the notification, for FY 2021/22 compliance as well as on ongoing transactions.

Further clarity may be required from the ITA to ascertain whether compliance with the notification is a prerequisite for the payer of income to consider DTAA benefits at the time of withholding.

Korea announces 2022 tax reform proposals

On 21 July 2022, Korea's Ministry of Economy and Finance announced the 2022 tax reform proposals (the 2022 Proposals). Unless otherwise specified, the 2022 Proposals will generally become effective for fiscal years beginning on or after 1 January 2023.

The key proposals are summarized below.

Detailed discussion

Changes in the Corporate Income Tax Rate

The Korean Corporate Income Tax Law (CITL) decreases the headline corporate income tax rate from 25% to 22% effective for the fiscal years beginning on or after 1 January 2023. In addition, qualified small- and medium-sized enterprises (SMEs) are entitled to receive a special corporate income tax rate of 10% on taxable income up to KRW500 million.

The following taxable summarizes the current and proposed rates:

Current taxable income (KRW)	Current rate	Proposed taxable income (KRW)	Proposed rate
Up to 200 million	10%	Up to 500 million	20% (10% for qualified SMEs)
200 million to 20 billion	20%	500 million to 20 billion	20%
20 billion to 300 billion	22%	20 billion and above	22%
300 billion and above	25%		

A local income tax at a rate of 10% is imposed in addition to the above rates.

Expansion of the annual deductibility limit for net operating losses (NOLs)

The 2022 Proposals expand the annual deductibility limit for NOLs from 60% to 80% of taxable income for domestic corporations. The deductibility limits for SMEs remain the same.

Repeal of the accumulated earnings tax regime

The current Korean tax law provides the accumulated earnings tax regime with the sunset clause due to expire as of 31 December 2022.

To reduce the regulatory tax burden on certain domestic large corporations, the 2022 Proposals repeal the accumulated earnings tax regime after the expiration of the sunset clause. However, the current tax rules remain to be applied to the accumulated earnings reserve.

Changes in the Securities Transaction Tax Rate

The 2022 Proposals adjust the timing of reducing securities transaction tax rates on securities traded on Korea's stock exchange to revitalize the capital market.

The following taxable summarizes the proposed changes:

Stock exchange	Current rate	2023 – 2024	2025 and future years
KOSPI Market	0.08%	0.05%	0%
KOSDAQ Market	0.23%	0.20%	0.15%

However, the current tax rules remain to be applied to securities transaction tax rates for KONEX and others (e.g., securities traded over the counter, non-listed securities traded).

Termination of the application period for special taxation for foreign workers

Under the current *Restriction of Special Taxation Act*, a foreign worker who starts work in Korea before 31 December 2023, may elect to have the 19% flat tax rate (20.9% including local income tax) applied for five consecutive tax years, without deductions.

The 2022 Proposals repeal the five-year application period starting from the wage income generated on or after 1 January 2023.

Deferral of taxation on virtual assets

Under the current Korean tax law, gains derived from the disposal of virtual assets by a foreign individual or foreign corporation are categorized as "other income" subject to withholding tax at the lesser of 11% of the transfer price or 22% of the net capital gains.

The 2022 Proposals provide the deferral of taxation on virtual assets from 1 January 2023 to 1 January 2025.

Revival of tax relief on bonds

The 2022 Proposals reintroduce the tax exemption on interest and capital gains earned from transactions related to government bonds and monetary stabilization bonds by foreign individuals and corporate investors. This relief is available for both direct investments and indirect investments through qualified foreign financial institutions (to be defined under the Enforcement Decree).

The above rule will be applied to interest payments or relevant bonds sold on or after 1 January 2023.

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Important dates

15 August 2022	Due date for monthly instalments
31 August 2022	6th month revision of tax estimates for companies with February year-end
31 August 2022	9th month revision of tax estimates for companies with November year-end
31 August 2022	Special 11th month revision of tax estimates for YA 2022, for companies with September 2022 year-end
31 August 2022	Statutory deadline for filing of 2022 tax returns for companies with January year-end. A blanket extension of time has been provided until 30 September 2022.
31 August 2022	Extended 2021 tax return filing deadline for companies with December year-end.
15 September 2022	Due date for monthly instalments
30 September 2022	6th month revision of tax estimates for companies with March year-end
30 September 2022	9th month revision of tax estimates for companies with December year-end
30 September 2022	Special 11th month revision of tax estimates for YA 2022, for companies with October 2022 year-end
30 September 2022	Statutory deadline for filing of 2022 tax returns for companies with February year-end. A blanket extension of time has been provided until 31 October 2022.
30 September 2022	Extended 2022 tax return filing deadline for companies with January year-end.

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