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Malaysian developments

Guidelines on the tax treatment for developers or management bodies for the maintenance and management of buildings and common property

The Inland Revenue Board (IRB) has published on its website updated Technical Guidelines in Bahasa Malaysia, titled "Garis Panduan Berhubung Layanan Cukai Ke Atas Pemaju Atau Badan Pengurusan Bagi Penyenggaraan Dan Pengurusan Bangunan Dan Harta Bersama" (Guidelines), dated 18 July 2022. These new seven-page Guidelines replace and revamp the earlier guidelines titled "Garis Panduan Berhubung Layanan Cukai Ke Atas Caj Penyenggaran Dan Pengurusan Harta Bersama Yang Diterima Oleh Pemaju, Badan Pengurusan Bersama Dan Perbadanan Pengurusan", which was published on 21 May 2012 (see *Tax Alert No. 13/2012*).

Broadly, the Guidelines were issued to explain the tax treatments for developers or management bodies (i.e., joint management bodies (JMBs), management corporations (MCs) or subsidiary MCs) for the maintenance and management of buildings and common property.

Some of the key points are outlined below.

- The mutuality principle (as defined in the Guidelines) among owners of property units also applies to the developers and/or management bodies that maintain and manage the buildings and common property. As such, maintenance charges, contributions to the sinking fund and any other receipts from mutual dealings with property owners will not be subject to tax, and the attributable expenses or capital expenditure will similarly be disregarded for tax purposes.

  Other income (other than that mentioned above) will be subject to tax and the relevant deductions can be claimed accordingly. The Guidelines also explain and provide an example (refer to "Lampiran 1" of the Guidelines) to illustrate the tax computation for an MC.

- A management body is taxed at the scaled rates prescribed under Paragraph 1, Part I of Schedule 1 of the Income Tax Act 1967 (ITA) and is required to submit its annual income tax return form (i.e., Form TF) pursuant to Section 77 of the ITA.

- A developer is taxed at the prevailing tax rates that apply to companies as prescribed under Paragraphs 2, 2A or 2B, Part 1 of Schedule 1 of the ITA, and is required to maintain separate accounts for its business and for the maintenance and management of buildings and common property.

Public Ruling (PR) No. 2/2022 – Tax Incentive for Organizing Conferences in Malaysia

The IRB has recently issued PR No. 2/2022: Tax Incentive for Organizing Conferences in Malaysia, dated 29 July 2022. The new six-page PR comprises the following paragraphs and sets out three examples:

1.0 Objective
2.0 Relevant provisions of the law
3.0 Interpretation
4.0 Introduction
5.0 Tax incentive
6.0 Separate accounts
7.0 Submission of income tax return form
8.0 Disclaimer

Broadly, the PR explains the tax incentives available to:

(a) Conference promoters promoting and organizing conferences in Malaysia as their main activity; and
(b) A qualifying person whose main activity does not include promoting and organizing conferences in Malaysia

Some of the key points are outlined below.

- The PR explains and provides two examples to demonstrate the tax incentive given pursuant to the Income Tax (Exemption) (No. 53) Order 2000 [P.U.(A) 500].

  P.U.(A) 500 provides that a conference promoter, which is a resident company, association or organization whose main activities are promoting and organizing conferences in Malaysia, is exempted from tax on statutory income derived from organizing conferences held in Malaysia. The exemption, which took effect from the year of assessment (YA) 1997, is granted on condition that the conference promoter brings in at least 500 foreign participants in the YA.

- The PR also explains and provides an example to demonstrate the tax incentive given pursuant to

the Income Tax (Exemption) (No. 4) Order 2021 [P.U.(A) 195] (see *Tax Alert No. 9/2021*).

P.U.(A) 195 provides that a qualifying person, which is a resident company, association or organization which carries on a business or activity other than the business or activity of promoting and organizing conferences, is exempted from the payment of income tax in respect of statutory income derived from organizing conferences held in Malaysia. Similar to P.U.(A) 500, the income tax exemption will apply only if the qualifying person brings in at least 500 foreign participants in the YA.

- The PR reiterates that the exemption granted under P.U.(A) 500 or P.U.(A) 195 does not absolve the conference promoter or qualifying person from any requirement to submit any return, statement of accounts or any other information as required under the ITA. A separate account will also need to be maintained for the income exempted under both Orders.

Updated Guidelines to the Tax Corporate Governance (TCG) Framework and Frequently Asked Questions (FAQs)

As highlighted in an earlier tax alert, the IRB had published on its website the new TCG Framework and the Guidelines to the TCG Framework (Guidelines) dated 11 April 2022 (see *Tax Alert No. 8/2022*). The TCG Framework provides an overview of the IRB's expectations on the application of TCG principles within an organizational setting. Broadly, the TCG encompasses the rules, relationships, systems and processes under which authority is exercised and controlled within an organization in relation to tax matters. The Guidelines were issued to supplement the TCG Framework.

Following the above, the IRB has published on its website the updated Guidelines and an FAQs document, dated 27 July 2022.

Some of the key changes to the Guidelines are outlined below.

- The updated Guidelines clarify that an organization that has been awarded participation status and intends to renew its participation status must inform the IRB accordingly within 12 months before the status expires.

- The updated Guidelines elaborate on the TCG review process by an organization, an independent reviewer, and the IRB respectively.

Some of the key points in the FAQs document are outlined below.

- **Items 4 to 6**
  The FAQs clarify that the TCG programme will be implemented in two phases.

  First phase (pilot project):
  - It began in June 2022 and is expected to end in June 2024
  - Selected organizations will receive an invitation from the IRB to participate in the TCG programme. Other interested organizations (who are not invited to participate) may contact the IRB via tcg@hasil.gov.my to convey their interest or obtain further information on the TCG programme.

  Second phase (post-pilot)
  - The TCG programme will be open to all organizations in the second phase

- **Item 9**
  There is no fee charged to participate in the TCG programme.

- **Item 14**
  Expenses incurred to implement the TCG are capital in nature and will not be tax-deductible under Section 33(1) of the ITA.

- **Item 15**
  Organizations that do not participate in the TCG programme will not be targeted for an audit. Cases selected for tax audit purposes will be based on risk assessments and the existing tax audit framework.

- **Item 16**
  Requests to withdraw from the TCG programme are to be made in writing. The IRB will assess the reasons for the withdrawal and factor this into the taxpayer's compliance risk profile.

- **Item 20**
  Organizations that are under investigation by the IRB may participate in the TCG programme only after the relevant issues are resolved. A grace period may apply.

- **Items 24 and 25**
  Organizations are required to publish their tax policy and/or tax strategy on any medium that is publicly accessible (e.g., website and annual report). Failure to do so will not result in any penalties, but may impact the IRB's review and assessment of the organization's TCG.

Overseas developments

UK Government releases draft legislation on new multinational top-up tax

On 20 July 2022, the United Kingdom (UK) Government released the summary of responses to the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Pillar Two consultation that closed on 4 April 2022. Alongside this, the UK Government also released draft legislation on the "Introduction of the new multinational top-up-tax" (the Draft Legislation).

The Draft Legislation builds on the Global Anti-Base Erosion (GloBE) Model Rules published by the OECD on 20 December 2021 which effectively provided governments with a template for legislating the global minimum tax rules. The Draft Legislation covers the application of the Income Inclusion Rule (IIR), however details on the timing and design of the UK's Undertaxed Profits Rule (UTPR) are not included. An update on the UTPR is expected to be issued later, in light of wider developments internationally. The Draft Legislation confirms that the IIR is expected to apply to accounting periods commencing on or after 31 December 2023.

The key observations from the various documents that have been released are summarized below.

Detailed discussion

Overview

- The UK Government is committed to enacting legislation which is consistent with the objective of the GloBE Model Rules and believes that the structure presented in the Model Rules is the most effective way to achieve this.
- There are areas of the Model Rules where the application is uncertain or not as clear as it could be. As such the Government has sought to include further rules within the Draft Legislation which reflect the outcomes expressed in the OECD's commentary to the Model Rules, where it was considered the Model Rules themselves were unclear.
- There is a very high threshold for agreeing on substantive changes to the GloBE Model Rules, and for any changes to be considered there would need to be the following conditions:
  - Clear evidence of undesirable outcomes that are inconsistent with the objectives of the Model Rules

- A viable alternative approach that is contained, and does not have an impact on other areas of the rules
- Broad consensus among the members of the Inclusive Framework on BEPS that the change is necessary

- Despite this, the Government does believe that some of the issues raised as part of the consultation may have satisfied this threshold and therefore deserve further consideration internationally, as well as domestically in certain cases.

Technical issues

Issues on which clarification has been provided or which require further discussion at an international level include:

- Concerns raised by businesses around Article 4.1.5 potentially leading to top-up taxation in a period in which the multinational enterprise (MNE) incurred a loss in a jurisdiction are being considered, and the Government will explore potential options that could address issues relating to the timing of the charge and the ability to access the substance based carve-out.
- Changes to the proposed mechanism to recast the deferred tax at 15% rather than at the local statutory rate and the recapture of deferred tax liabilities after a period of five years have been ruled out.
- It is recognized that there is significant uncertainty around the effect of Article 9.1.3 of the Model Rules; the transition rule which limits the basis of assets transferred after 30 November 2021. The UK Government agrees there is a need for further guidance on this point and intends to raise this as part of the Implementation Framework.
- It has been acknowledged that credits arising from a debt release could result in significant adverse outcomes in some scenarios under the Model Rules, most notably the fact that a top up tax could be due even in the circumstance where the group is in financial distress. It has been confirmed that this issue will be raised as part of the work on the Implementation Framework.
- The UK Government agrees that foreign exchange gains or losses on hedging instruments which are within the scope of the UK Disregard Regulations should be excluded from GloBE income if the instrument is hedging an excluded item. This had been identified in the commentary to the Model Rules as requiring resolution, and as such the Government has confirmed these concerns will be raised within the Implementation Framework.

Administration and reporting

Clarification on the following administration, compliance and reporting issues is provided in the consultation response:

- There will be a one-time requirement for MNEs to register that they are in scope of GloBE when they first come into scope.
- A single entity will register and file on behalf of the whole MNE group, and there will be an annual notification in line with the requirements in the Model Rules. The default position will be that this is the Ultimate Parent Entity, although the MNE will be permitted to designate an alternative entity if it wishes.
- Reporting of a top up tax liability to HM Revenue & Customs (HMRC) will be done through the MNE's Pillar Two digital service, which is separate to the existing corporation tax return.
- The registered entity will submit a short report alongside either its GloBE Information Return or annual notification, which will confirm its liability under the Model Rules to the UK. The filing date for this short domestic return will be aligned with the filing dates of the GloBE Information Return.
- Payments of top-up tax will be made in a single annual installment, 15 months from the end of the accounting period (18 months in the Transition Year), in order to align with filing obligations. This should remove the requirement to estimate GloBE liabilities.

Comments on the US GILTI Regime

The consultation response sets out how the United States (US) Global Intangible Low-Taxed Income (GILTI) regime may be dealt with, to the extent the requisite changes to align it with the GloBE Model Rules are further delayed.

It is expected that any tax paid in the US under the GILTI regime would be included in the adjusted covered taxes of a US company's controlled foreign corporation (CFC) for the purposes of both the IIR and UTPR. It is, however, acknowledged that there would need to be rules to determine the additional US tax that results from a GILTI inclusion, and how that should be allocated to the CFCs of Constituent Entities to which the GILTI inclusion relates.

Further details on how this mechanism is expected to work in practice, and indeed whether it will be replicated by other Inclusive Framework members, remain to be seen.

Safe Harbors

The UK Government is supportive of a safe harbor which switches off the operation of the rule where a territory has adopted a Qualified Domestic Minimum Tax (QDMT) which is closely aligned with the Model Rules. The UK Government acknowledges that many stakeholders were in favor of a "whitelist" safe harbor that, broadly, would switch off the Model Rules in jurisdictions that are considered to be high tax by the Inclusive Framework. However, there is still uncertainty as to whether consensus on the adoption of such safe harbors would be achieved between members of the Inclusive Framework given that the Model Rules look at the effective tax rate within a jurisdiction and therefore a safe harbor based on the statutory tax rate is still likely to require adjustments such that any benefits of simplification may be lost.

The UK Domestic Minimum Tax (DMT)

The Government maintains that there are strong arguments in favor of a UK DMT and confirm that if a DMT is introduced the threshold would be €750m to mirror the Pillar Two rules, and that it would apply to both UK-headed and foreign-headed MNEs. In addition, the Government will consider the costs and merits of application to wholly domestic groups to prevent economic distortions. However, as yet, there is no commitment to introduce a DMT and therefore, the Government welcomes further comments.

Next stage

The Draft Legislation is open for comment until 14 September 2022. The UK Government will analyze the feedback it receives with a view to including the measures in the Finance Bill to be issued at the end of this year after the UK Budget. The final contents of that Finance Bill will be a decision for the Chancellor (and will be influenced by whichever of the two current candidates – Rishi Sunak and Liz Truss – becomes the next Conservative Party Leader).

Indian Government amends Special Economic Zone (SEZ) rules to permit employees of certain Special Economic Zone units to work from home

On 14 July 2022, the Indian Government issued a new rule (Rule) authorizing SEZ units engaged in the IT or IT-enabled Services (ITeS) sectors and a few other specified categories to permit employees to work from home (WFH) upon meeting certain conditions. The new Rule also provides guidance on procedures for seeking approvals and other related compliance requirements.

The Rule and its implications for Indian entities operating out of such SEZ units are summarized below.

Detailed discussion

Background

Indian entities with SEZ units are governed by certain operational regulations under SEZ law. These regulations govern, among other matters, the location from which employees can work and restrictions on the removal of assets outside of the SEZ unit, given that SEZ units are delineated and notified zones.

In the current business environment, permitting employees to WFH has emerged as an essential requirement for companies to attract and retain talent. The SEZ law had introduced regulations to permit WFH for employees of IT/ITeS SEZ units, but there was lack of clarity on certain operational aspects (e.g., duration of approval, threshold of number of employees permitted to WFH, etc.).

The Indian Government has now issued the Rule clarifying some of these issues.

Clarifications provided in the Rule

Categories of employees

The Rule clarifies that the following employees (including contractual employees) may be permitted to WFH or from any place outside the SEZ unit: (i) employees of IT and ITeS SEZ units; (ii) temporarily incapacitated employees; (iii) employees who are travelling; and (iv) employees who are working offsite.

Process for obtaining approval

The SEZ unit needs to submit its application to the Development Commissioner (DC) of the SEZ containing the terms and conditions of WFH, the date from which permission is sought and details of the employees. The application must be submitted at least 15 days in advance (except for employees temporarily incapacitated or travelling) and if the employees of the SEZ unit are already WFH, then the application must be submitted within 90 days of the date of issuance of the Rule (i.e., 14 July 2022).

The SEZ unit needs to maintain robust documentation such as employee attendance records. The employees working from home may only engage in services that are approved for the SEZ unit.

Number of employees permitted to WFH

The permission granted by the DC will cover a maximum of 50% of the total employees including contractual employees, but the DC is empowered to approve a higher number for valid reasons to be recorded in writing.

Duration of approval

The approval shall be granted for one year, which can be extended annually upon meeting the conditions prescribed under the Rule.

Assets permitted to be taken out of the SEZ

The SEZ unit can provide employees with assets like laptops, computers, video projection systems, other electronic equipment and secured connectivity to facilitate the WFH arrangement, subject to obtaining approvals and maintaining documentation. These assets can be provided without payment of any taxes or duties only for the duration of the WFH approval.

Implications

The Rule is a welcome step and addresses the long-standing request from the IT/ITeS sector for clarity on WFH arrangements from SEZ units. IT/ITeS SEZ units will need to carefully review the impact of this Rule and take steps to obtain approvals and maintain prescribed documentation. In certain specific cases e.g., for SEZ units engaged in voice-based BPO services, WFH regulations under other regulations like Other Service Provider rules will also apply and need to be considered.

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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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