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Update on Malaysia's double taxation relief agreement (DTA) with Poland

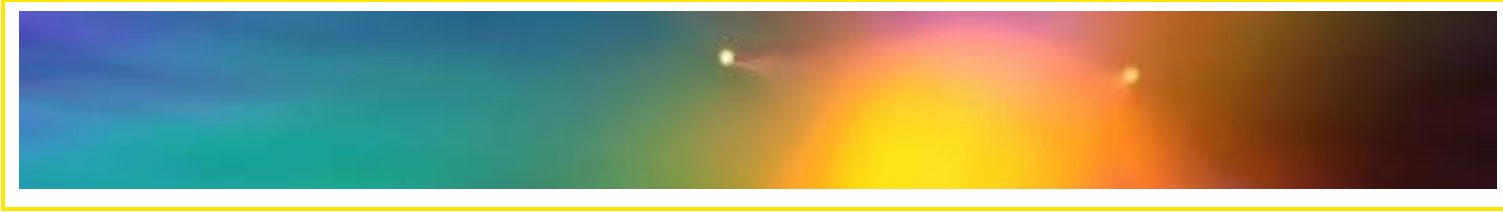
The Malaysia-Poland DTA, which was signed on 8 July 2013, entered into force on 12 January 2023. The DTA is effective from 1 January 2024, with the exception of the provisions of Articles 25 and 26 (Mutual Agreement Procedure and Exchange of Information) which are effective from 12 January 2023.

The table below summarises some of the withholding tax rates under the DTA in respect of payments from Malaysia to a Polish resident:

Payments	Withholding tax rate	
	Normal rate	DTA rate
Interest	15%	0% / 10% ^{Note}
Royalties	10%	8%
Fees for technical services	10%	8%

Note:

The 0% applies if the recipient is the Government of Poland or certain qualifying institutions of Poland. In other cases, the 10% rate applies.



Submission of Form CKHT 502 via e-CKHT is mandatory for payments under Section 21B of the Real Property Gains Tax Act 1976 (RPGTA)

On 16 February 2023, the Inland Revenue Board (IRB) issued a media release stating that for payments under Section 21B of the RPGTA, it will be mandatory for taxpayers to submit the Form CKHT 502 via e-CKHT on the MyTax Portal, effective from 1 January 2023. This is in line with the implementation of the “bill number” which is to be used as a mandatory reference for certain tax-related payments (see *Tax Alert No. 1/2023* and *Special Tax Alert No. 1/2023*).

The “bill number” can be obtained via the following method:

- (a) Visit the MyTax Portal (<https://mytax.hasil.gov.my>) and log in using your Identification number and password. In a situation where you do not have a Tax Identification Number (TIN), an application can be submitted via e-Daftar on the MyTax Portal.
- (b) Select “e-CKHT” under the ezHasil Services menu
- (c) Enter the acquirer’s TIN and select “Form CKHT 502”
- (d) Complete the necessary information and print out the payment slip. The “bill number” will be displayed on the said payment slip.

Notwithstanding the above, the media release also clarifies that during the transition phase, individual acquirers may still submit the Form CKHT 502 manually until 28 February 2023.

Further guidance on the process is available at the following link:

[tatacara-isi-borang-dan-bayaran-ckht-502-melalui-sistem-e-ckht-12012023.pdf \(hasil.gov.my\)](#)

Overseas developments

ECOFIN adopts revised list of non-cooperative jurisdictions for tax purposes

On 14 February 2023, the Council of the European Union (the Council) held an Economic and Financial Affairs Council (ECOFIN) meeting where Finance Ministers approved the [Council Conclusions](#) on the revised EU List. Regarding Annex I, the Council decided to add four jurisdictions (the British Virgin Islands, Costa Rica, the Marshall Islands, and Russia). With respect to Annex II and the state of play of pending commitments, the Council removed Barbados, Jamaica, North Macedonia, and Uruguay and added Albania, Aruba, and Curaçao.

The Council will continue to review and update the EU List biannually, with the next update due in October 2023.

Detailed discussion

Background

The EU started working on the list of non-cooperative jurisdictions for tax purposes in 2016. On 5 December 2017, the Council published the first EU list of non-cooperative jurisdictions for tax purposes, comprised of two annexes. Annex I includes jurisdictions that fail to meet the EU’s criteria by the required deadline, and Annex II includes jurisdictions that have made sufficient commitments to reform their tax policies but remain subject to close monitoring while executing their commitments. Once a jurisdiction has executed all of its commitments, it will be removed from Annex II.

The initial list of Annex I included 17 jurisdictions that were deemed to have failed to meet relevant criteria established by the European Commission (the Commission). Since the release of the EU List, there have been multiple changes to its composition based on recommendations made by the Code of Conduct Group for Business Taxation (COCG). Such changes may occur if, for example, new jurisdictions or regimes are identified and analyzed by the EU COCG or jurisdictions already on the EU List are re-assessed. A de-listing for both Annex I and Annex II is considered justified in light of an expert assessment if it is established that the jurisdiction now meets all the conditions posed by the COCG.

The Commission also adopted the first countermeasures against listed non-cooperative tax jurisdictions by the adoption of a Communication in March 2018 that set new requirements against tax avoidance in EU legislation governing, in particular, financing and investment operations. The requirements aim to ensure that EU external development and investment funds cannot be channeled or transited through entities in jurisdictions listed in Annex I without being confronted with countermeasures.

Moreover, in 2019, the Council released additional guidance on defensive measures toward non-cooperative jurisdictions. On the same date, it also released guidance on assessing jurisdictions with notional interest deduction regimes and the treatment of partnerships under criterion 2.2 (existence of tax regimes that facilitate offshore structures that attract profits without real economic activity). In accordance with the guidance on defensive measures mentioned above, EU Member States are committed, as of 1 January 2021, to use Annex I in the application of at least one of four specific legislative measures:

- ▶ Non-deductibility of costs incurred in a listed jurisdiction
- ▶ Controlled foreign company rules
- ▶ Withholding tax measures

- ▶ Limitation of the participation exemption on shareholder dividends

Many Member States have already adopted or drafted legislation for such defensive measures.

Revised EU List

On 14 February 2023, the EU Finance Ministers met in Brussels for an ECOFIN meeting, during which the Ministers adopted the conclusions on the revisions of the EU List.

As noted, the Council adopted a revised Annex I of the EU List by adding the British Virgin Islands, Costa Rica, the Marshall Islands, and Russia. According to the Council [press release](#) on the revised EU List, the reason for the inclusion on the list is that:

- ▶ The British Virgin Islands was found not to be sufficiently in compliance with the Organisation for Economic Co-operation and Development standard on exchange of information on request (criterion 1.2).
- ▶ Costa Rica has not fulfilled its commitment to abolish or amend the harmful aspects of its foreign source income exemption regime (criterion 2.1).
- ▶ For the Marshall Islands, there are concerns that this jurisdiction, which has a zero or nominal rate of corporate income tax, is attracting profits without real economic activity (criterion 2.2).
- ▶ Russia has not fulfilled its commitment to address the harmful aspects of a special regime for international holding companies (criterion 2.1). In addition, dialogue with Russia on matters related to taxation came to a standstill following the Russian aggression against Ukraine.

The revised Annex I of the EU List now includes 16 jurisdictions: American Samoa, Anguilla, the Bahamas, the British Virgin Islands, Costa Rica, Fiji, Guam, the Marshall Islands, Palau, Panama, Russia, Samoa, Trinidad and Tobago, the Turks and Caicos Islands, the US Virgin Islands, and Vanuatu.

The Council also amended the list of jurisdictions included on Annex II of the EU List which covers jurisdictions that have made sufficient commitments to reform their tax policies, but which remain subject to close monitoring while they are executing on these commitments. Following the delivery of the commitments given, the Council removed Barbados, Jamaica, North Macedonia, and Uruguay from Annex II. In contrast, Albania, Aruba, and Curaçao were added to the Annex II as:

- ▶ Albania has a potentially harmful regime which it has committed to amend or abolish.
- ▶ Aruba and Curaçao do not have Global Forum determinations as regards the automatic exchange of information on financial accounts that meet the Code requirements, but they have committed to improving them.

Three other jurisdictions already included on Annex II (Hong Kong, Malaysia and Qatar) were granted an extension of the deadline to deliver on their commitments.

As a result, the revised Annex II now comprises 18 jurisdictions: Albania, Armenia, Aruba, Belize, Botswana, Curaçao, Dominica, Eswatini, Hong Kong, Israel, Jordan, Malaysia, Montserrat, Qatar, Seychelles, Thailand, Turkey, and Vietnam.

Next steps

The Council will continue to periodically review and update the EU List, taking into consideration the evolving deadlines for jurisdictions to deliver on their commitments and the evolution of the listing criteria that the EU uses to establish the EU List. Until 2019, the EU List was regularly updated without a fixed schedule to reflect the reforms undertaken by third countries. However, from 2020, Member States have agreed that the EU List will be updated no more than twice a year to ensure a more stable listing process, business certainty and so that the Member States can effectively apply defensive measures against listed jurisdictions. Accordingly, the next revision to the EU List is expected in October 2023.

Implications

With its listing process, the EU continues to exercise pressure on third states to enhance transparency and remove harmful elements from their tax systems. Businesses with activities in jurisdictions listed as non-cooperative are advised to understand the implications of a jurisdiction being included in Annex I, including:

- ▶ Reporting obligations that arise from the mandatory disclosure rules (MDR) contained in Directive 2011/16/EU as amended by Council Directive (EU) 2018/822 (MDR Directive or DAC6), which, inter alia, require the disclosure of cross-border arrangements that involve cross-border deductible payments when the recipient of the payment is tax resident in a jurisdiction included on the EU List of non-cooperative jurisdictions for tax purposes.
- ▶ EU Member States may consider applying one or more defensive measures, including taxation measures and measures outside the field of taxation, to prevent the erosion of their tax bases. These may include measures such as the non-deductibility of costs, enhanced controlled foreign company rules or withholding tax measures, among others.

The lists will also have implications for the public Country-by-Country Reporting, as, under these rules, information should be disclosed on a country-by-country basis and thus be disaggregated for all 27 EU Member States and all jurisdictions included in Annex I (on the on the first of March of the financial year for which the report should be drawn up) and Annex II (on the first of March of the financial year for which the report should be drawn up for two years consecutively) of the EU List. Also, companies cannot delay the publication of commercially sensitive information for up to five years if the information relates to jurisdictions listed on Annex I and Annex II of the EU List.

As the work on the EU List is a dynamic process, companies should continue closely monitoring

developments, including the introduction of defensive measures toward non-cooperative jurisdictions by the other Member States.

Hong Kong to further revise its foreign source income exemption (FSIE) regime to expand the scope of disposal gain

As a response to the recent update of European Union (EU) guidance, Hong Kong announced that it will further revise its FSIE regime by end of 2023 in relation to the scope of foreign-sourced disposal gains to enable Hong Kong to be removed from the EU watchlist of non-cooperative jurisdictions for tax purposes. A consultation will be held during 2023 on the proposed further amendments to the refined FSIE regime.

Detailed discussion

Hong Kong's refined FSIE regime came into effect on 1 January 2023, whereby specified foreign-sourced income in the form of: (i) dividends; (ii) interest; (iii) intellectual property (IP) income; and (iv) disposal gain in relation to shares or equity interests received in Hong Kong will be subject to tax unless certain additional requirements are met.

The refined FSIE regime was recently confirmed by the EU to be fully compliant with the guidance on the FSIE regime originally published in 2019 but only with regards to: (i) dividends; (ii) interest; and (iii) IP income. However, as per the updated guidance issued by the EU last December, the scope of disposal gains, subjected to the economic substance requirement under Hong Kong's refined FSIE regime, would need to be further extended to cover more asset classes.

In response, Hong Kong announced that it will further amend the refined FSIE regime in relation to the scope of foreign-sourced disposal gains. The related legislative amendments are expected to be made by

end of 2023 to bring the revised FSIE regime into force from January 2024. The Government indicated that it will conduct a consultation to seek stakeholders' comments on the proposed additional amendments.

Meanwhile, the Government will also solicit views from stakeholders on the safe harbor rules for treating disposal gains on equity interests as being capital in nature. Such a safe harbor rule would facilitate multinational enterprises in evaluating their disposal gains and where the same are treated as onshore capital gains, the same would be non-taxable in Hong Kong.

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Important dates

28 February 2023	6 th month revision of tax estimates for companies with August year-end
28 February 2023	9 th month revision of tax estimates for companies with May year-end
28 February 2023	Statutory deadline for filing of 2022 tax returns for companies with July year-end. A blanket extension of time has been provided until 31 March 2023.
28 February 2023	Extended 2022 tax return filing deadline for companies with June year-end.
15 March 2023	Due date for monthly instalments
31 March 2023	6 th month revision of tax estimates for companies with September year-end
31 March 2023	9 th month revision of tax estimates for companies with June year-end
31 March 2023	Statutory deadline for filing of 2022 tax returns for companies with August year-end. A blanket extension of time has been provided until 30 April 2023.
31 March 2023	Extended 2022 tax return filing deadline for companies with July year-end.

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