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Contents

Brazil

Brazil ends transitional tax regime and changes corporate tax rules

On 13 November 2013, important changes were introduced, by Provisional Measure No.67, in the laws relating to Corporate Income Tax, Social Contributions on Net Profits (CSLL), Contributions for the Financing of Social Security (being Contribuição para o Financiamento da Seguridade Social "COFINS"), the Programa de Integração Social (PIS) and the Programa de Formação do Patrimônio do Servidor Público (PASEP). [PIS and PASEP are social contributions payable by companies to finance the funds for insurance for unemployment, child benefit and an allowance for low paid workers.]

The main changes were the repeal of both the transitional tax regime, known as RTT, which was established by Law Nr 11.941 of 2009 and the revocation of the tax law changes introduced into accounting rules and accounting principles prescribed by Law 11.638 of 2007.

With a few exceptions, the RTT changes shall be effective from 1 January 2015. However, taxpayers can choose to anticipate the adoption of the amendments from 1 January 2014.

The changes are wide-ranging and complex. A summary of the most relevant according to our assessment includes:

a. Changes resulting from the adoption of international accounting standards - IFRS are mandatory from 1 January 2015 and optional from 1 January 2014.

b. Repeal of the Transitional Tax Regime (RTT). The new standard lists all the adjustments that must be performed to determine taxable income as a result of the convergence of Brazilian accounting standards to IFRS. Among the adjustments we can highlight:
   - the exclusion of income representing investment subsidies from the tax calculation
   - the use of tax rates for calculating the depreciation of assets and excluding the effects of depreciation rates determined through an assets useful life, in accordance with accounting practices

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- elimination of the accounting effects resulting from adjustments to present value
- for the calculation of tax liabilities, expenses connected with leasing are considered deductible and depreciation calculated by the accounting standards is excluded.

c. Changes in the determination of goodwill on acquisition of an equity interest, where the cost of acquisition must now be divided into three parts:
   i. asset value
   ii. gain or loss on net assets/liabilities
   iii. future earnings (goodwill) or profitable purchase, which corresponds to the difference between the acquisition cost and the gain or loss on net assets/liabilities.

   The difference between the acquisition cost and book value of the equity interest acquired shall be allocated first to the gain or loss on assets and only the residual value is classified as goodwill for future profitability, or gain on profitable purchase.

   The new standard eliminates the effects resulting from the realisation of the gain or loss on disposal and of goodwill in the calculation of income used to calculate income tax and social contributions.

d. Merger, Consolidation or Split - Gain on profitable purchase: The company that absorbs the assets of another by virtue of merger, consolidation or split, with a gain from a profitable purchase, must include the gain in determining the taxable income of the assessment periods subsequent to the date of the event, at the rate of one sixtieth, at least, for each month of the period of assessment.

e. Electronic Book of Calculation of Taxable Income: It will be mandatory that a digital version of the Tax Calculation Book should be delivered through the Public Digital Bookkeeping System (SPED). There will be a fine of 0.025% of gross revenues per month of delay in shipping.

f. Profits or dividends:
   Profits or dividends calculated on the basis of results for the periods between 1 January 2008 and 31 December 2013 and paid until 12 November 2013 (date of publication of MP 627). Where these amounts are higher than those calculated based on accounting principles effective from 31 December 2007, are not subject to a withholding of income tax at source, or to be included in the calculation basis for income tax and social contributions of the beneficiary, regardless of whether the recipient is an individual or a legal entity, whether or not resident or domiciled in the country or abroad.

   So, the doubt that existed before on this subject is eliminated. This rule can only be used by companies who opt for the application of the rules contained in the new standard in 2014. For the 2014 fiscal year, profits or dividends may only be distributed without withholding taxes to the extent of income earned through tax and not the accounting methodology.

g. Interest on equity:
   For fees calculated as interest on equity between 1 January 2008 and 31 December 2013, it was authorised to use the net equity measured in accordance with the new accounting practices. This rule can only be used by companies that choose the application of the rules contained in the new standard in 2014. For the 2014 fiscal year, interest on capital can only be calculated based on the net equity determined through the tax methodology.

h. Profits accrued abroad by Brazilian corporate entities:
   - the new standard enables the investor entity domiciled in Brazil to pay income tax and the Social Contribution on Net Profits (CSLL) arising from profits accrued abroad by subsidiaries, to the extent that the results are distributed. Payment may be made up to the fifth year following the assessment period. In the first year, at least 25% of calculated profit will be considered distributed
   - profits earned by foreign subsidiaries are taxed on an accruals basis
   - losses of the same overseas company can now offset profits in subsequent years, but limited to five years carry-forward
   - profits accrued by affiliates (not subsidiaries) abroad will be taxed on a cash basis, provided that the investee is not located in a tax haven, is not controlled by a company domiciled in a tax haven and has its own active income equal to or higher than 80% of its total income.

i. There are significant changes in the taxation of profits earned abroad by subsidiaries and affiliates and the profits accrued by individual's resident in Brazil through corporate subsidiaries abroad.

j. Profits accrued abroad by individual's resident in Brazil: Profits of a foreign subsidiary located in a tax haven shall be considered, for tax purposes, as profits available at the balance sheet date. The same will be the case for an individual who does not have the documents of a legal entity domiciled abroad. Taxation is levied only on the effective distribution of those profits in other situations.

k. Taxation on exchange:
   Properties acquired via exchange will be taxed according to their fair value updated every year.

l. There are changes in the rules for the payment by instalment on debts of income tax and social contributions on profits of overseas subsidiaries and affiliates, and debts of PIS and COFINS of financial institutions and insurance companies, including a 100% reduction in isolated fines and interest on arrears.

   All changes introduced by the MP still depend on approval by the National Congress, which to be valid, depend on its conversion into law and subsequent regulations. Thus, these amendments are still subject to change.

Given its coverage, the above summary aims only to give an idea of the main changes. A specific study would be required for each of the contributors to the tax liability, to arrive at a correct assessment of the possible implications that these changes can bring in the calculation of federal taxes and a company's results.

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China

China's transfer pricing landscape gaining ground

As reflected in the law changes and investigations during the last ten years, China's tax authorities have expanded their knowledge base and capabilities for pursuing and correcting often unacceptable transfer pricing (TP) practices that may be utilised by both multinational and domestic companies. In 2013 Beijing saw the settlement of a TP investigation, in which ten years of a pharmaceutical company's profits were adjusted upward and yielded an additional RMB110 million in tax revenues. This case represents only the tip of the iceberg. A brief look at the statistics from 2005 to 2010 reveals a steady increase in TP case tax adjustment revenues, from a total of RMB460 million in 2005 to about RMB2.6 billion in 2010. While in earlier years TP investigations were focused on the manufacturing industry, the services sector is now drawing increased attention as well. No company is immune to the latest TP enforcement developments within China, and one might well ask: what has changed?

Firstly, in addition to developing and promulgating more detailed TP rules, the State Administration of Taxation (SAT) has steadily improved both the numbers and capability levels of its transfer pricing auditors. Secondly, China increasingly represents an important part of the overall profitability and growth strategies of multinational companies. Owing to both operational efficiency and growth of participation in the domestic Chinese marketplace, the China operations of foreign companies have significantly increased their contributions to the overall profitability of these foreign companies. Whereas it has been common for multinational companies to treat their China subsidiaries as low cost, low input and low value-added entities in their TP practices, Chinese tax authorities no longer accept this treatment as a given, instead taking the view that Chinese subsidiaries are moving up the value chain. As such, the SAT's focus is towards preventing the shift of profits contributed by Chinese subsidiaries out of the country to overseas entities through TP practices that are questionable as to how well profits are allocated to various entities in a multinational group.

Key to Chinese tax authority TP investigations is an analysis of the functions and risks undertaken by a Chinese subsidiary relative to other entities in a multinational company, and subsequently how the residual profits are allocated among all the entities. According to the SAT's Implementing Measures for Special Tax Adjustments (Trial), enterprises with profit levels that do not match with the functions performed and the risks assumed are key targets of transfer pricing audits. The functions of a company engaged in related party transactions may include research and development, design, purchasing, processing, assembling, manufacturing, stock management, distribution, after sales service, advertising, marketing, transportation, warehousing, financing, accounting, legal, human resources management and many others. The related risks therefore may include research and development risk, purchasing risk, production risk, distribution risk, marketing promotion risk, management risk, financial risks etc. With an eye towards such function and risk analysis, SAT TP auditors are focused on several factors that may bring profit allocation into question.

As an example, if a foreign-invested trading company that sells luxury goods in China also performs sophisticated marketing functions here, the SAT may take the view that local marketing intangibles are created, which should be rewarded with higher profitability. The SAT may thus claim that the trading company cannot be simply regarded as limited-risk distributor and it would not be reasonable for the foreign parent company to claim that all the marketing intangibles belong to them. Likewise, when a foreign-invested manufacturing company begins operations in China, it may be reasonable for the parent company to charge royalties for certain intellectual property (IP) licensed to and utilised by the manufacturer. However, the SAT may consider that, over time, and as the manufacturing subsidiary becomes more sophisticated in its process or product development, the subsidiary is also developing its own IP, so royalties paid to the parent company should decrease.

Furthermore, China's SAT is focusing on cost savings that may be realised by a multinational company that produces goods in China at a lower price, such that profits earned abroad exceed profits that would be earned if there were no manufacturing done in China. In the course of a TP audit, SAT authorities may question whether or not the increased profits due to the cost savings contributed by the China entity should be allocated to the China entity rather than the foreign parent company. Similarly, SAT officials may question how profits are allocated between a multinational company's entities when goods manufactured by a Chinese subsidiary are sold into the Chinese marketplace at a premium price over what can be realised in other markets. The argument is that this premium price gives rise to profits that should be allocated to the Chinese subsidiary.

Indeed there are inherent challenges for SAT's in applying transfer pricing rules in China. In particular it is difficult to find perfect comparables, due to limited information and a lack of sharing mechanisms between different administration authorities and different regions. It is also difficult to make reasonable pricing adjustments between Chinese companies and potential comparables that are located overseas. Thus, rather than looking at a Chinese subsidiary in isolation, the SAT looks at the subsidiary's profitability in the context of the parent company's entire global supply chain, focused on the value drivers that are unique to the subsidiary because of its situation in China. Increasingly the SAT leans towards the use of the residual profit method or other hybridised methods to ensure that arm's length pricing principles are utilised and that reasonable profit allocations are made between related entities.

According to the SAT's, of multinational companies that have transfer pricing arrangements in place, 60% use the transactional net margin (TNM) method; about 12% use the residual profit split (RPS) method; and the remaining 28% use a mix of the other methods outlined in the Organisation for Economic Cooperation and Development (OECD) guidelines. In light of SAT's current focus and practices, tax authorities are increasingly requesting that multinational companies examine whether or not the RPS method will better reflect the way profits should be allocated among entities, especially in cases where related party transactions take place between parties that both own valuable intangibles that contribute to the profit structure of the multinational. While China's regulations differ from the OECD guidelines, it may be argued that when two related parties to a transaction are both in large part vertically integrated, the RPS method may be the only applicable method under both the China regulations and the OECD guidelines.

Over 6,000 TP reviews are conducted in China each year and nearly 200 cases become full TP audits that may cover up to a ten year period for the companies involved. Moreover, when a given audit is completed and settled, the SAT may continue to monitor the company practices for an additional period of five years, thus increasing the effective scrutiny period to a total of 15 years. So far, large multinational company cases, such as the Beijing pharmaceutical company case mentioned above, have represented the "low hanging fruit" by which the SAT could maximise the returns on its efforts. However, all companies large and small are subject to TP reviews, some of which result in income tax adjustments after the mandatory TP documentation is submitted each year with tax returns. Reviews or audits are guaranteed if a company does not maintain and/or file its TP documentation as prescribed by China's TP regulations.

China's TP landscape will continue to develop and change, and practices will never be stagnant. It is therefore exceedingly important that all companies, especially large and medium sized companies that engage in numerous related party transactions each year, periodically review their TP policies and practices, as well as ensure that their TP documentation accurately and effectively explain and justifies any TP positions taken.

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Germany

Tax policy of the new German government

The German Christian-Democrats and the Social-Democrats issued their "coalition agreement" on 27 November 2013. The parties adopted policies set to burden German businesses. One example is the nationwide minimum wage. The following article shows that there are also several important tax matters which the government want to implement or improve within the next four years.

In general, it is welcome that the "coalition agreement" does not contain any changes or increases to tax rates. However, one main goal of the two parties is to introduce new laws preventing tax avoidance by multinational companies, which will include sanctions against banks that violate laws. In order to achieve this, the agreement relates to planned measures of the Organisation for Economic Cooperation and Development (OECD) regarding Base Erosion and Profit Shifting (BEPS). However, the German government intends to implement the necessary measures on a unilateral basis if the OECD cannot agree with the following measures by 2015:

1) creation of a public register for taxpayers holding economic ownership through trust structures
2) limitation of tax deductibility for payments made to recipients that lack sufficient substance
3) allowance of license payments as deductible expenses only if the payment was subject to minimum taxation at the level of the foreign recipient.

Double non-taxation of profits as well as double deduction of payments should be prevented through such measures.

It is worth mentioning that several issues which were discussed prior to the "coalition agreement" are not included in this final paper. For instance, a reform of the tax consolidation system was discussed, but was not included.

Furthermore, the so called e-governance should be expanded and strengthed. On the one hand, this should be reached through a self-assessment system for corporate taxpayers and on the other hand through improved risk management by the tax authorities. One important part of that is the e-balance sheet for tax purposes. In future, an electronic tool which analyses tax returns automatically should supplement risk management by the tax authorities.

The "coalition agreement" states that there will be no change regarding German inheritance tax, property tax and municipal trade tax. It is only planning to reform the property tax and trade tax system. The paper contains only limited information regarding the detailed measures, but several tax-related goals are mentioned. The most interesting ones are listed in the following:

- support of the Common Consolidated Tax Base (CCTB) project in order to implement a common corporate income taxation within the European Union
- giving benefits under the domestic law implementation of the EU interest and royalties directive to all types of investment income for individuals and corporations
- inclusion of subject-to-tax clauses in Germany's tax treaties in order to avoid non-taxed income and introduction of measures into domestic law to ensure that this goal is reached
- avoidance of VAT fraud and use of tax havens
- potential adjustments to current capital gains taxation for portfolio investments in order to avoid dividend stripping or other optimised tax planning
- support of OECD model treaty provisions regarding the exchange of information between member states
- introduction of country-by-country reporting for multinational companies
- disallowance of tax neutral share-for-share exchanges or mergers if additional payments or value exchanges are made in relation with such transactions
- support for the implementation of a financial transactions tax as an element of an EU initiative.

It remains to be seen which points will be implemented by the new government and at which date. However, taxpayers as well as their tax advisors have to pay careful attention to upcoming developments concerning the issues described above. In particular, the concrete measures to combat evasion and harmful tax planning are eagerly awaited.

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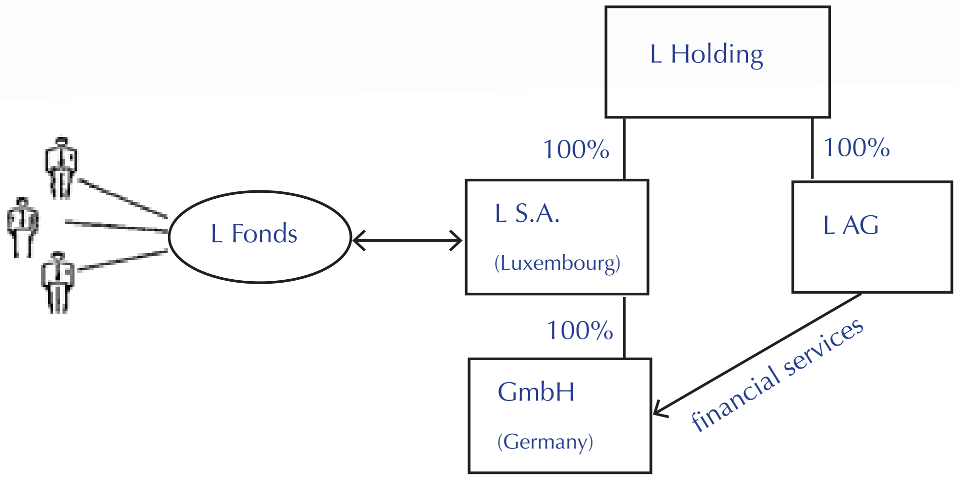
Germany

German Federal Financial Court rules on compatibility of transfer pricing documentation requirements with EU law

The Federal Financial Court (BFH) examined Germany's transfer pricing documentation rules according to section 90 para 3 of the General Tax Act (GTA). This obligation only applies to cross-border transactions with related parties, but does not apply to pure domestic related parties. Therefore a restriction on the EU freedom to provide service occurred in the following case:
In a decision dated 10 April 2013, a German resident limited liability company (GmbH), the taxpayer was acquired by a Luxembourg stock company (L AG) and later resold to a Luxembourg S.A. Both the S.A. and the L AG were held by a Luxembourg holding company. Shortly after, the taxpayer and the L AG signed a service agreement. The German tax authorities requested transfer pricing documentation from the taxpayer in order to assess whether or not the service fees paid were at arm's length, or whether such payments could be qualified as hidden profit distributions. The taxpayer appealed against the request to provide documentation.



Court's judgment

Although the Court acknowledged that the documentation requirements violates the "freedom to provide services" principle under the Treaty on the Functioning of the European Union, it finally ruled in favour of the tax authorities. It was stated that the different treatment of cross-border and domestic cases could be justified by overriding reasons which were in the public interest, namely to ensure effective fiscal control. The BFH also noted that without the documentation, it would not be possible for the German tax authorities to test the arm's length nature of the transactions. However, this is only applicable for cross-border transactions, because of the different tax systems of the participating countries. The fact that the BFH did not submit this case to the ECJ shows that there were no doubts about the justification through the ensurance of effective fiscal control.

The BFH also pointed out that 26 of the 28 member states of the European Union had introduced comparable rules into their own systems without apparent legal problems and that the European Commission had published its own summary explaining and supporting such schemes. However, it has to be considered that not all those rules are exclusively in respect of foreign transactions.

Furthermore, the BFH clarified that the required information could not be guaranteed through the mutual assistance of the tax authorities in other countries. Thus, sharing of information through administrative assistance procedures does not replace the documentation requirements according to section 90 para 3 GTA. Regarding the definition of the term "related party" pursuant to section 1 para 2 German Foreign Tax Act (AStG) it was stated that a shareholding of more than one-quarter of the company's capital led to a related party relationship. There is no mention of voting rights or restrictions on the right of a shareholder to act in respect of its investment. Other parts of the "related party" definition, such as a relationship by contract, complemented the shareholding criterion, but did not restrict it. Accordingly, an obligation not to set management policy for the German subsidiary against the wishes of the members of the fund, did not destroy a shareholding-based relationship. Even if such an obligation did exist, a breach would not invalidate the measure at issue. In particular, it would merely make the Luxembourg shareholder liable for damages. The BFH emphasised that the reason for the shareholding was also irrelevant. Thus, the company remained the related party of the service provider and was subject to the transfer pricing documentation rules even where the shares were held in a trust for investors in the fund.

German administrative regulations

The documentation requirements pursuant to section 90 para 3 GTA are specified through the 'VG-Verfahren', which is a general administrative regulation by the German tax administration. These detailed regulations are binding for the tax administration, but not to the taxpayers. However, where the taxpayer does not fulfil the documentation requirements in accordance with the administrative regulation or refuses to draw up the documentation, the German tax authorities are allowed to estimate higher tax bases according to section 162 para 3 GTA and, in addition, to assess a penalty according to section 162 para 4 GTA.

The BFH left its decision open as to whether the detailed requirements of the German administrative regulation go beyond what is necessary to determine the German tax base. In this context, it is worth mentioning that there was strong criticism by tax experts on the introduction of the 'VG-Verfahren' in the year 2005. Thus, it is expected that taxpayers will take legal action against these detailed regulations. It should also be noted that the taxpayer has yet to file an appeal against either the assessment which contains the estimated tax base or against the assessed penalty. The BFH clarified that this appeal can not be filed against the request for documentation under section 90 para 3 GTA.

In conclusion the decision on 10 April 2013 was in favour of the tax authorities. However, it has to be considered that where there is a ruling against the compatibility of Germany's transfer pricing documentation requirements, it would be very likely that the documentation requirements would be extended to domestic cases instead of rejecting them for cross-border transactions. A prominent example to such a German legislative reaction is the change in the taxation of portfolio dividends which took place in March 2013.

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Malaysia

Malaysian Goods and Services Tax

Originally slated for implementation on 1 January 2007, the Malaysian Goods and Services Tax (GST) was then deferred. In 2009, another attempt was made to introduce GST and the GST Bill 2009 was presented in Parliament for the first reading on 16 December 2009. However, the proposal again became highly politicised and in light of the political expediency of the ruling party in government, the Ministry of Finance on 13 October 2010 announced the postponement of the implementation of GST. Finally, it was announced in the 2014 Budget proposals on 25 October 2013, that GST will be implemented from 1 April 2015 and was passed by Parliament.

Roll-out

It may appear that the roll-out period of more than 17 months is excessive but the government has already embarked on a vigorous campaign to raise awareness of the benefits of GST for strengthening fiscal management of the country and reducing the fiscal deficit to its citizens. Preparations are already in place to set- up the infrastructure for the processing and collection of GST. The business community and GST professionals and consultants are gearing up for the introduction of GST. Multiple preparatory courses and training are being conducted and planned for the coming months on all fronts.

GST in Malaysia

GST will be coming into force from 1 April 2015 at a standard rate of 6%. With its implementation, sales tax and service tax will be abolished.

GST is a multi-stage consumption tax on all goods and services in Malaysia, at all levels of business transactions.

GST is payable in stages by the intermediaries in the production and distribution process. However, the tax itself is not a cost to the intermediaries as it will ultimately pass on to the final consumers.

In Malaysia, a taxable person is a person who is required to be registered under the GST Act. A taxable person is a person who makes taxable supplies in Malaysia and whose annual turnover exceeds the proposed threshold of MYR500,000 in the preceding 12 month period, or he is currently making taxable supplies and his annual taxable turnover is expected to exceed MYR500,000 in the next 12 months. Such person is required to be registered under the GST Act within 28 days from the end of the month where taxable turnover exceeds or is expected to exceed the threshold. However, a person who is not required to register as a taxable person under the GST Act may also register voluntarily.

A taxable person is required to charge GST (output tax) on the value added portion of his taxable supply. He is also allowed to claim input tax credit on any GST (input tax) incurred in his business. This mechanism would avoid double taxation.

The following is the GST model to be implemented in Malaysia:

Scope of tax

(i) GST is charged on goods and services at all levels starting from production, manufacture, wholesale and retail on its value added portion
(ii) GST is charged on goods and services supplied within the country or imported into the country
(iii) Supplies made by the Federal and State Government departments are not within the scope of GST except for some services prescribed by the Minister of Finance
(iv) Supplies made by the local authorities and statutory bodies in relation to regulatory and enforcement functions are not within the scope of GST
(v) GST charged on all business inputs is known as input tax whilst GST charged on all supplies made (sales) is known as output tax. For eligible businesses, the input tax incurred is fully recoverable from the Government through the input tax credit mechanism.

Zero-rated supply

A zero-rated supply means goods and services sold by businesses that are charged GST at a zero rate. For such businesses, GST paid on their inputs can be claimed as credits. The proposed list of goods and services which is subject to GST at zero rate can be obtained from the GST guidelines.

Exempt supply
Exempt supply means goods and services sold by businesses that are exempt from GST. For such businesses, GST paid on their inputs cannot be claimed as credits. The list of goods and services which are exempted from GST can be obtained from the GST guidelines.

GST returns
A taxable period which ends on the last day of the month of any calendar year will be assigned to every taxable person. A taxable person may also apply for a varied taxable period which is subject to the approval of the Director General (DG). Generally, the category of the taxable period will be based on the amount of annual business turnover as below:

Annual sales	Taxable period of
RM5 million and above	One month
Less than RM5 million	Three months (default taxable period)
Small and seasonal sales business	Six months

Every taxable person is required to furnish to the DG, the GST returns no later than the last day of the month following the end of the taxable period. Any tax due in respect of a taxable period either under invoice basis or payment basis, is payable to the DG on the due date of the submission of the GST returns.

The following penalty will be imposed by the DG if any tax due and payable, remains unpaid by a person after the last day on which it becomes due and payable:

Tax remains unpaid	Rate of penalty	Cumulative
1-30 days	5%	5%
31-60 days	5%	10%
61-90 days	3%	13%
91-120 days	3%	16%
121-150 days	3%	19%
151-180 days	3%	22%
181 days or more	3%	25%

Beside the above penalty, the directors of the company or the partners of the firm or officials or committee members of the society or other body of persons, as the case may be, shall together with the company, firm, society or other body of persons, be jointly and severally liable for the tax, penalty, surcharge or any other monies.

More detailed information, guidelines and updates may be obtained through the GST website: www.gst.customs.gov.my

GST or in some countries Value Added Tax (VAT) has already been implemented in 160 countries worldwide. Malaysia will be the 8th country in the ASEAN region and 27th country in Asia to do so. It is acknowledged that it is a “fairer” tax on the basis that tax is collected on consumption versus income. It is however incumbent on the government to exercise prudent fiscal management when implementing GST, by reducing income tax rates and minimising any impact on perceived cost of living increases caused by GST. Proposals are in place to alleviate these concerns and Malaysia can draw on the experiences of the countries that have successfully implemented GST/VAT.

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Netherlands

New substance requirements

In August 2013, the State Secretary of Finance of the Netherlands announced measures to provide information (spontaneously) to tax treaty partners with respect to certain financing and licensing companies. In this respect the Dutch government released a proposed Decree in October 2013 (scheduled to apply from 1 January 2014), which provides the Dutch tax authorities with a legal basis to supervise more strictly, professional service providers (trust companies).

The proposed Decree states that companies whose activities in a given year consist primarily (ie at least 70%) of group financing and licensing activities (or similar activities such as leasing activities), need to confirm (in their annual corporate income tax return) whether they meet the following substance requirements:

- at least half of the total number of statutory board members of the tax payer with power of decision, reside or is actually established in the Netherlands
- the board members residing or established in the Netherlands have the required professional knowledge to properly perform their duties. The duties of the board include, at least, decision-making on transactions to be entered into by the tax payer and ensuring a proper handling of the transactions entered into
- the tax payer has qualified employees for proper implementation and registration of the transactions to be entered into by the tax payer
- the management decisions are taken in the Netherlands
- the main bank accounts of the tax payer are held in the Netherlands
- the books are kept in the Netherlands
- the business address of the tax payer is in the Netherlands
- the tax payer is - to the best of the tax payer’s knowledge - not considered a resident for tax purposes in another country.
- the tax payer runs real risks with respect to its financing, licensing or leasing activities
- the tax payer has at least an appropriate equity with regard to the functions performed by the legal entity.

These substance requirements show similarity, but are not identical to the minimum substance requirements that a group financing company currently needs to meet in order to be able to conclude an Advance Pricing Agreement with the Dutch tax authorities. Some of the APA substance requirements have been clarified in a published ruling policy (for example, the requirement that the main bank accounts should be held in the Netherlands was interpreted to mean that the Netherlands

company should have full authority over its bank accounts, but not necessarily that the accounts should be with a bank in the Netherlands). The Decree proposal does not contain such clarifications. At the moment there are no indications that the State Secretary of Finance intends to deviate from the APA substance requirements.
If a tax payer cannot confirm that all substance requirements are met, he should:
(i) indicate which requirements are not met
(ii) provide all necessary information for the tax authorities to determine which of the substance requirements are met
(iii) provide an overview of all the interest, royalty and similar payments for which a reduction of (withholding) tax has or could be claimed under any tax treaty or EU Directive.

According to the Decree proposal, this information will be spontaneously provided to the relevant treaty partner, who may take this information into account when determining whether the relevant tax payer can apply the benefits of the tax treaty.

Not or not timely disclosing above information is regarded a violation which could result in an administrative fine.

In case further information is required, please contact us.

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Poland

Limited joint-stock partnerships (LJSPs) are now subject to corporate income tax

On 26 November 2013 the Polish President signed the amendment to Acts on corporate income tax and personal income tax. According to the project, revolutionary changes in the scope of taxation of limited joint-stock partnerships were implemented starting from 1 January 2014.

Scope of the changes
Till the end of 2013 LJSPs were considered transparent for tax purposes – these entities were not regarded as income tax payers, it was exclusively their partners that were subject to income taxation. Depending on the status of partners, they were taxed with CIT (for partners in the form of limited liability companies or joint-stock companies) or with PIT (for natural persons). As the result of the changes, the catalogue of CIT payers was extended by LJSPs. Therefore, just like in the case of capital companies, so called double taxation of income is currently applicable – both at the level of limited joint-stock partnerships as well as their shareholders. It is worth mentioning that, according to the initial project of the Polish Ministry of Finance, not only LJSPs but also limited partnerships were supposed to become CIT taxpayers starting from 1 January 2014. However, after a stormy discussion at the parliament finance committee session, it was decided that limited partnerships would remain income tax transparent as vehicles are not so commonly used in an aggressive tax planning.

Benefits of LJSP
In recent years a legal form of limited joint-stock partnership has enjoyed great attention, inter alia due to tax benefits arising from the one-time taxation of income. In addition to the above, as opposed to other partnerships, in this type of company it is possible to limit the liability of shareholders. Moreover, the form of limited joint-stock partnership guarantees a number of business benefits both through the freedom to trade in its shares and possibly to easily join a company as a new shareholder.

Furthermore, taxpayers made LJSPs an excellent tax saving tool, using it in capital structures, in combination with a closed-end investment fund or foreign (especially Cypriot) investment vehicle. The applied optimisation resulted in reducing or even eliminating the tax burden in Poland. The attractiveness of LJSPs as a tax planning instrument was increased after the release of the resolution of the Supreme Administrative Court dated 16 January 2012, subsequently reflected in the general ruling of the Minister of Finance. The discussed judgments confirmed that the taxation of profits attributable to limited partners (shareholders) of LJSPs may be deferred until dividends were paid.

After the CIT amendment, as a general rule limited joint-stock partnerships became subject to CIT under the same rules as joint-stock companies and limited liability companies. The differences concern, in particular, the exemption from withholding tax (WHT) on revenues received from royalties and interest paid by entities from within the EU – such an exemption will not be applied to LJSPs. As far as the taxation rules of the general (unlimited) partner are concerned, he has the right to deduct from his income tax due on payments from the profit earned by LJSP, that part of the tax paid by this partnership attributable to his share.

Restructuring possibilities

According to the transitional provisions, in some cases the preferential rules of the taxation of limited joint-stock partnerships may last for a couple of months of 2014 (eg in the case where the tax year of the entity ended after 31 December 2013, with some exceptions).

The other entrepreneurs have had to look for another optimal form of business activity and depending on the decision made – modify their current capital structures.

Depending on the level of risk related to conducting a given business activity, the solution may be to set up a general partnership (maintaining tax benefits but simultaneously increasing risk) or a limited liability company (providing greater security to its shareholders against a liability for obligations of the company). It is also possible to establish a capital structure consisting of a general partnership and a limited liability company – having a detailed division of functions and settlements between the companies, entrepreneurs will be able to keep, at least partly, the reduction of the tax burden with a simultaneous limitation of risk.

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Singapore

Voluntary disclosure programme: to disclose or not to disclose?

Taxpayers may make errors in their tax matters due to ignorance or negligence, without wilful intent to evade taxes. The Voluntary Disclosure Programme (VDP) was first introduced by the Inland Revenue Authority of Singapore (IRAS) back in 2009. The VDP aims to encourage taxpayers to come forward voluntarily, in a timely manner, to set their tax matters right. For such taxpayers who will become compliant subsequently, the IRAS will be prepared to impose reduced penalties. To further encourage taxpayers to voluntarily disclose any errors made in their tax returns, the IRAS enhanced the VDP in year 2013 so that taxpayers may also choose to voluntarily disclose their past actions involving wilful intent to evade taxes.

This article provides an overview of the VDP to-date.

The Singapore tax system has yet to move completely to self-assessment basis. At present, the IRAS could take several approaches to verify the completeness and accuracy of tax returns filed by taxpayers. The IRAS may raise queries to require details and supporting documentation relating to the taxpayers' transactions. The IRAS may also conduct tax audits involving an examination of the taxpayer's financial and business records in order to verify the compliance of tax returns. In cases where tax evasion or fraud is suspected, the IRAS may carry out investigations into the taxpayers' tax matters.

Depending on the outcome of the IRAS' review, there could be additional tax assessments raised on taxpayers. Under the Singapore tax law, the IRAS is empowered to impose penalties of up to 200% of the tax undercharged and a fine up to SGD5,000 or a jail term up to three years. In cases where the errors made involved a wilful intent to evade tax, the penalties can go up to 300% of the tax undercharged and the fine/jail term can increase to SGD10,000 and seven years respectively.

The VDP

The IRAS introduced the VDP in 2009 to provide an avenue for taxpayers to voluntarily disclose errors made in their tax returns, without an intention to evade taxes, in order to qualify for reduced penalties. The VDP covers individual income tax, corporate income tax, goods and services tax (GST), withholding tax and stamp duty.

For a voluntary disclosure to qualify for the VDP it must be timely, accurate, complete and self-initiated. A voluntary disclosure is considered by the IRAS to be timely and self-initiated if the error is disclosed before the IRAS commences a query or notification of an audit or investigation that is directly related to the error disclosed.

In a voluntary disclosure, the taxpayer is expected to provide all the information required by the IRAS. Such information includes an explanation of the circumstances that led to the error that was made and what controls have been or will be put in place to prevent the recurrence of the error.

To qualify for the VDP, the taxpayer must also cooperate fully with the IRAS to correct the errors made and has to pay or adhere to any arrangement made with the IRAS to pay the additional taxes and any penalties imposed by the IRAS.

Enhancements to the VDP

The VDP has been enhanced in the following three aspects:

Inclusion of actions involving wilful intent to evade tax

The scope of VDP has been significantly widened to include the voluntary disclosure of past actions, involving the wilful intent to evade taxes by taxpayers or persons who assisted or abetted the tax evasion.

The IRAS has explained that an action involving wilful intent to evade taxes includes two elements: the 'act' as well as the 'knowledge'. Examples of such an 'act' are the omission of income in a tax return, making a false entry in an income tax return, understating output tax or overstating input tax in a

GST return and preparing false books of accounts or records. 'Knowledge' requires the taxpayer to know that the act will lead to lower tax liabilities and / or excess tax refunds.

Qualifying disclosures would be eligible for the offence to be compounded at a reduced penalty rate of 200% instead of prosecution.

Reduced penalties

The reduced penalties for qualifying voluntary disclosures vis-à-vis all other disclosures are shown as follows:

Income tax

	During 1-year grace period	After 1-year grace period
Voluntary disclosures qualifying for VDP	0%	5% of tax undercharged for each year that income was late in being brought to tax
All other disclosures (assuming no wilful intent to evade taxes)	Up to 200% of tax unpaid	

GST

	During 1-year grace period	After 1-year grace period
Voluntary disclosures qualifying for VDP	0%	Flat 5% (voluntary disclosures under the IRAS' Assisted Compliance Assurance Programme may enjoy a grace period of more than one year for waiver of penalties)
All other disclosures (assuming no wilful intent to evade taxes)	Up to 200% of tax unpaid	

Withholding tax

	During 1-year grace period	After 1-year grace period
Voluntary disclosures qualifying for VDP	0%	Flat 5%
All other disclosures (assuming no wilful intent to evade taxes)	Up to 200% of tax unpaid	

Stamp duty

5% per annum computed on a daily basis on the stamp duty payable.

Lifting the restriction on frequency of voluntary disclosures

Regardless of the frequency of voluntary disclosures by taxpayers, all voluntary disclosures that meet the VDP qualifying conditions may qualify for reduced penalties. It should be noted however, that after a taxpayer has been granted reduced penalties under the VDP, the taxpayer should implement adequate and robust measures to prevent a recurrence of similar errors.

Comments

It is noteworthy that tax evasion and assistance/abetting in tax evasion are now covered by the VDP and that for qualifying disclosures, offenders will not be prosecuted. Where the revised penalties are concerned, although penalties are still applicable for cases where the grace period is exceeded, the penalties are significantly less than what would apply absent the VDP. Finally we believe that the previous requirement that only first-time disclosures of errors qualified for VDP was overly strict and the lifting of this requirement is much welcomed.

Tax is complicated by its nature, and ignorance or negligence on the part of taxpayers can easily lead to errors. The VDP is a major initiative of the IRAS to encourage taxpayers to get their tax matters right through both the disclosure of errors and putting in place controls and measures in order to comply with the tax law. The VDP application process is fairly straightforward and the above enhancements have further increased its attractiveness to taxpayers. The key takeaway for taxpayers is to seriously review their tax affairs and if applicable, avail of the VDP's benefits, more so with the current trend of increased transparency and information sharing between tax authorities.

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Spain

New resident visa and resident permit for foreign investors

The Spanish Act 14/2013, as of 27 September 2013 for the support of entrepreneurs and their internationalisation, has introduced a new way of granting a Spanish resident visa and residence permit for foreign investors.

In order to qualify for the Visa, any of the following investments must be made by each foreign individual:
1) Spanish public debt amounting to at least EUR2 million
2) Shares in Spanish companies exceeding EUR1m
3) Cash deposits in Spanish banks exceeding EUR1m
4) Spanish real estate exceeding EUR0.5m
5) Entrepreneurial projects in Spain that either:
   a. create jobs
   b. imply investments with a relevant socio-economic impact in the location of the business, or
   c. make relevant technological or scientific innovation contributions.

Investments made through entities which are not resident in tax haven territories also qualify for this purpose, provided that the foreign individual holds at least 50% and has the power to appoint the majority of their directors.

The investor's resident visa will be issued for a one year period. Holders of the investor's visa may ask for an investor's resident permit for periods of two years, that may be extended for two more years. For that purpose, the following requirements are to be met:
1) maintenance of the aforementioned investments
2) travelling to Spanish territory at least once on each permit period
3) fulfilment of tax and social security obligations.

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UK

Transfer-pricing 'loophole' for individuals closed by HMRC

The UK's transfer pricing legislation substitutes an arm's length price where the actual price charged in transactions between connected parties would result in a UK tax advantage, such as an increase in a tax loss or a reduction in taxable profits. With regard to transactions between UK entities, if the effect of the substitution is to increase one party's profits the other party may claim a compensating adjustment to reflect the same arm's length price. The compensating adjustment mechanism is to ensure that transfer pricing adjustments between connected UK entities are broadly tax-neutral. HMRC has become concerned that the ability to claim compensating adjustments has been exploited by some individuals to obtain an overall reduction in their tax liability.

New legislation took effect from 25 October 2013 to prevent persons other than companies (including individuals and trusts) from claiming compensating adjustments. This legislation was targeted at two types of tax avoidance arrangement but may have a wider impact on some genuine commercial arrangements.

The first avoidance arrangement involves professional partnerships that employ their staff through a separate service company, which the partnership owns. Where the partnership chooses not to pay an appropriate arm's length fee to the company for providing the service, the partnership can activate the transfer pricing rules to its advantage. For example, if the arm's length price is GBP105 million but the partnership only pays GBP100m, the company would be required to make a transfer pricing adjustment of GBP5m on which it would be subject to corporation tax of 23%. The partnership would be able to claim a compensating adjustment that would reduce its taxable profits by GBP5m, saving income tax at 45% and NIC but with no effect on the accounting profits available to the partners.

The second arrangement involves the excessive leveraging of companies by individuals. The transfer pricing rules restrict tax relief in the company on interest deductions arising from the non-arm's length debt. A compensating adjustment could then be claimed by the lender so that its taxable income mirrors the interest on which the company obtains a deduction. This effectively removes an amount of interest equal to the excess over the arm's length amount from the charge to income tax in the hands of the lender.

Both arrangements seek to take advantage of the differential between corporation tax and income tax rates for the benefit of the individual who has an economic interest in the company.

To counteract these arrangements the new legislation will prevent persons (other than companies) within the charge to income tax from claiming a compensating adjustment where the counterparty is a company within the charge to corporation tax.

Where the compensating adjustment claim that is denied would have related to excess interest paid by the counterparty, the excess over an arm's length amount will be treated for income tax purposes as a dividend rather than interest and taxed at dividend rates rather than at rates applicable to interest.

The company party to the transaction will still be required to make a transfer pricing adjustment if the transaction is not at arm's length.

The changes take effect in relation to amounts that are referable to a time on or after 25 October 2013. Amounts of fee income or interest accruing before that time are outside the scope of the measure.

This change in legislation is expected to increase tax receipts by approximately GBP70m and is an example of the UK government taking immediate and targeted action to prevent perceived exploitation of tax legislation.

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Notes

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