Asia Pacific tax

January 2012

Contents

Welcome to the second edition of Grant Thornton's Asia Pacific tax newsletter. The newsletter provides summaries of the recent taxation changes and current hot topics within the Asia Pacific region.

The Grant Thornton Asia Pacific tax team provides a complete range of services for organisations operating within the region. We have a regional network of more than 370 partners and 5,500 staff, with access to over 30,000 people across 110 firms worldwide.

The multi-disciplinary team consists of multilingual specialists from a variety of backgrounds, including industry specialists, ex-government officials as well as senior accounting practitioners. Specialists in services such as transfer pricing, corporate tax and accounting, mean we can deliver the most pragmatic advice possible.

With a balance of local knowledge and a strong international capability, we are well positioned to help companies understand and manage the opportunities and threats of operating in the region.

To find out more about the topics featured in this newsletter, do not hesitate to get in touch with our Asia Pacific team; we have included contact details on the last page of this newsletter.

Australia

Reform of Australia's transfer pricing rules for multinational companies

Grant Thornton welcomes a Federal Government initiative to reform Australia's transfer pricing rules for multinational companies. Assistant Treasurer Bill Shorten announced that reforming transfer pricing rules and Australia's future tax treaties will bring them into line with international best practice, improving the integrity and efficiency of the tax system. Transfer pricing refers to the pricing of transactions between related entities within multinational groups, such as the prices charged when one division of a multinational company buys or sells products and services from another part of the same group in different countries. The prices charged will have an impact on profit levels and, in turn, the amount of tax to be paid by a multinational in respective countries. Indeed, the Federal Government argues transfer pricing reforms aim to strengthen the integrity of Australia's corporate tax base and prevent erosion.

The Government initiative is a response to the Federal Court's recent finding against the approach to transfer pricing cases by the Australian Taxation Office (ATO). The Federal Court rejected the ATO's use of the transactional net margin method (TNMM) in favour of the taxpayer's comparable third party transaction information (CUP). The court highlighted discrepancies in the ATO's application of the arm's length principle, which favours using traditional transaction transfer methods to price intercompany dealings. As part of reforming transfer pricing, Mr Shorten also released a consultation paper[1], calling for interested parties to submit their views regarding proposed changes to the regulatory framework. The closing date for submissions was 30 November 2011.

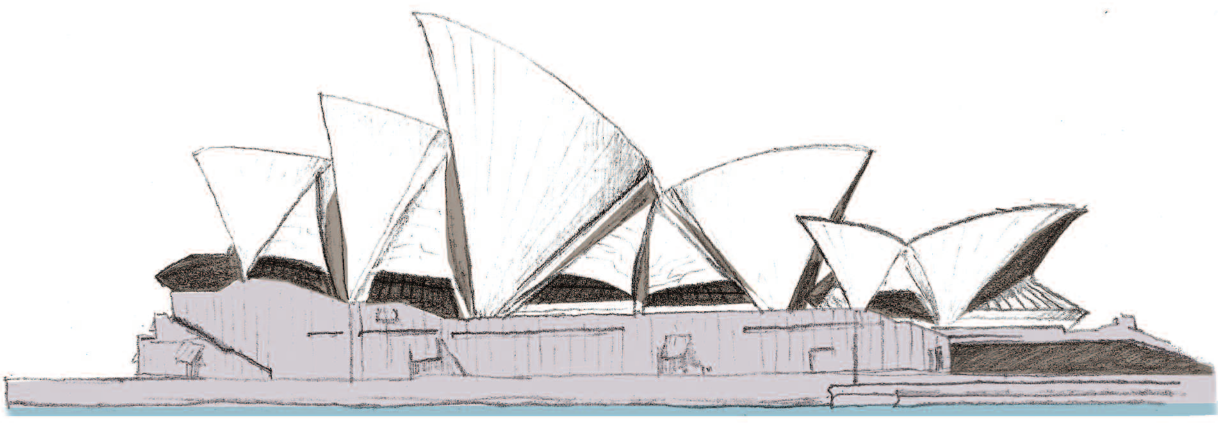
The consultation paper refers to the Organisation for Economic Cooperation and Development (OECD) substantially updating its transfer pricing guidelines in 2010. OECD guidelines, based on the arm's length principle, stipulate that conditions imposed between two entities within a multinational group should be the same as any deal done between two unrelated entities.

1 Consultation paper 'Income Tax: Cross Border Profit Allocation – Review of Transfer Pricing Rules' – 01.11.11.

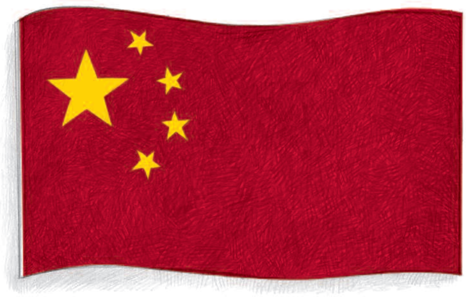
Included among the proposed changes to Australia's transfer pricing regulatory framework are endorsing and regulating the use of the OECD guidelines; incorporating the arm's length principle into law; and to limit the existing discretionary powers of the tax commissioner to determine the arm's length outcome for intercompany dealings. Also proposed are legislative and treaty amendments for moving to a 'functionally separate entity' for the attribution of profits to a permanent establishment (PE).

Grant Thornton transfer pricing senior manager Lorena Sosa said, "providing a more structured framework to existing transfer pricing rules, by aligning them to international guidance provided by the OECD, will provide taxpayers with greater certainty in managing transfer pricing policies and risk. We believe care needs to be taken when drafting the new legislation to avoid inserting 'profit allocation rules', or outlining that the purpose of the rules is to limit the erosion of the Australian tax base." She also commented, "As highlighted by the OECD, the application of the arm's length principle aims to ensure that the terms and conditions of intercompany dealings are the same as those expected to be agreed between non-related parties and not ensure a particular tax result in the context of profit allocation".

Ms Sosa says, "taxpayers with certain volumes of intercompany dealings will have a statutory obligation to prepare contemporaneous documentation and establish processes to set and review their transfer prices in line with those provided by the OECD guidelines. Taxpayers entering into new intercompany dealings, or seeking business restructuring schemes, will be encouraged to document and plan their intercompany transactions. Grant Thornton has immense experience in preparing transfer pricing documentation and in effectively and efficiently planning intercompany transactions".



China



Detailed VAT reform pilot programme released in Shanghai

Premier Jiabao Wen officially announced that the VAT reform pilot programme is to be implemented in Shanghai from 1 January 2012. In November 2011, to further introduce the implementation and transitional rules, the China Ministry of Finance (MOF) and the State Administration of Taxation (SAT) jointly released circulars – Caishui [2011] No.110 'Pilot program for transformation from Business Tax (BT) to Value-added Tax (VAT)' (Circular 110) and Caishui [2011] No.111 'Notice of the pilot program for the transformation from BT to VAT in transportation and some modern service industries in Shanghai' (Circular 111).

Circular 110 and Circular 111 clarify the implementation of VAT reform in Shanghai. We have summarised the key points of the two circulars and share our observations and opinions.

Salient points

- the implementation and transitional rules take effect on 1 January 2012. Currently, only certain industries in Shanghai will be subject to the pilot programme. These pilot industries and VAT rates are set out in the following table, all other services and activities will still be subject to BT.

Pilot industries	Applicable VAT rates
Tangible movable property leasing services	17%
Transportation service industry	11%
Research, development and technical services	6%
Information technology services	6%
Cultural creative services	6%
Logistic auxiliary services	6%
Certification and consulting services	6%

- the qualification of a general VAT taxpayer will be consistent with the existing VAT regime, general VAT taxpayers and small-scale VAT taxpayers are also classified in the pilot programme. The criteria of a general VAT taxpayer and the applicants obligations are set out below:
  1. it is compulsory that VAT taxpayers with annual turnover over five million Renminbi (RMB) apply for the general VAT taxpayer status.

     A taxpayer who is engaged in the transportation of goods, by road or inland water, should also apply for the general VAT taxpayer status, even if its annual turnover is below five million RMB.
  2. it is not necessary for existing general VAT taxpayers in the pilot industries to additionally apply for identification if its provision services shall also be subject to VAT with the relevant annual turnover of over five million RMB.
- the circulars retain a number of exemptions frequently relied upon by businesses as part of the BT regime. The grandfathering of existing BT preferential policies, include:
  1. Technology transfers by pilot taxpayers are exempt from VAT
  2. Offshore outsourcing services provided by businesses registered in Shanghai from 1 January 2012 to 31 December 2013 are exempt from VAT. Such services are referred to as information technology outsourcing (ITO), business process outsourcing (BPO) or knowledge process outsourcing (KPO).
- the transitional rules of the pilot area include:
  1. Year end input VAT to be credited. It is not allowed for existing general VAT taxpayers in the pilot area to claim the 2011 year end input VAT as credit from the 2012 output VAT arising from the pilot industries.

     In other words, only input VAT incurred on or after 1 January 2012 could be claimed as credit of the output VAT generated from the services of pilot industries.

2. certain pilot taxpayers, who file BT on a net margin basis under BT regulations, are allowed to deduct payments made to non-pilot enterprises (ie. the taxpayers who are not subject to VAT in Shanghai and other taxpayers out of Shanghai) to compute their taxable turnover for VAT purposes.

   In other words, the qualified taxpayers from the transportation services industry could deduct the payments made to non-pilot taxpayers for the computation of VAT turnover.

Our observations

We would like to share our observations on the following important points.

Tangible movable property leasing services

We note that the original turnover tax regulations have different treatments on tangible movable property leasing services as described below:

1. Operating leasing services of tangible movable property shall be subject to BT at the rate of 5% as 'service industry – leasing' in the BT regime
2. Financial leasing services of tangible movable property provided by financial enterprises that have obtained specific approvals, shall be subject to BT at the rate of 5% as 'finance and insurance industry' in the BT regime
3. Other financial leasing services of tangible movable property shall be subject to the VAT regime.

According to Circular 111, tangible movable property leasing services, including operating and financial services, are subject to VAT at the rate of 17%. Considering the limited input VAT credit, the leasing industry will be faced with huge challenges under the VAT reform.

Overseas entities providing services in China

Highlights are shown below of the policies regarding overseas entities or individuals providing services in China without an operating agent, that are subject to the pilot programme:

1. VAT withholder

   The agents in China shall be the VAT withholder for the above mentioned overseas entities or individuals. If there is no agent, the relevant service recipients in China shall act as the VAT withholder. This is consistent with the existing BT regulations.
2. VAT liabilities to be withheld

   The computation of VAT liabilities is based on the following formula:

   VAT liabilities = total amount to be paid by service recipient ÷ (1+ VAT rate) x VAT rate

   Please note that with service importation, the overseas entities are VAT taxpayers and bear the VAT on their own, whilst in goods importation, the Chinese entities are the import tax taxpayer.

   In addition, the overseas entities will not physically receive 100% of the service fee in the contract as the VAT withholder in China will file a withholding tax return and settle the VAT payment with the Chinese tax authority.
3. VAT withheld acts as input credit

   According to Circular 111, the service recipients in China are allowed to claim the VAT withheld for the overseas entities as their own input VAT credit, supported by the documents below:
   - tax payment certificate
   - service contract
   - payment statement
   - invoices from overseas entities.

   We emphasise that this is a very special treatment in the VAT mechanism.

   In addition, on the assumption that the service recipient in China treats the above mentioned input VAT (ie. VAT withheld) as its costs of services and claims it as a deduction in its Corporate Income Tax (CIT) computation, it is necessary to make a book-to-tax adjustment for CIT annual filing purposes.

Deemed VAT taxable services

The existing BT regulations deemed the below activities as BT taxable services:

- donation of real property
- donation of land use right.

Circular 111 expands the scope of 'deemed taxable services'. Specifically, if an entity in the pilot industries provides transportation or some modern services for free to others, such services will be deemed as VAT taxable services, except for charitable activities.

Meanwhile, the tax authorities can determine the VAT turnover according to the below methods, if the price of the 'deemed taxable service' is not available:

1. Average price of the same taxable service conducted by the taxpayer in the most recent period
2. Average price of the same taxable services conducted by other taxpayers in the most recent period
3. Deemed charging basis of VAT.

> The formula of the deemed charging basis of VAT shall be:
> Deemed charging basis of VAT = cost × (1 + cost profit margin rate)

Change of tax collection and administration

The pilot programme makes it clear that there will be no change in the collection method of tax revenue, which means that the pilot area which originally collected BT revenue will also collect VAT after the VAT reform. In this regard, it is advised that pilot taxpayers assess whether the financial subsidy or other tax benefits from Shanghai local authorities will be effected or not.

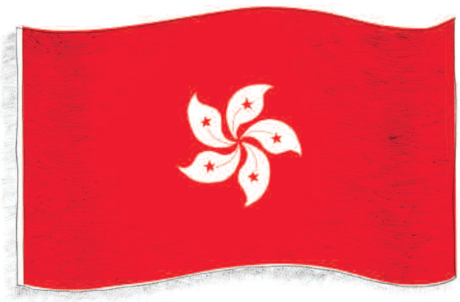
Our suggestions

- Circular 110 and Circular 111 will undoubtedly have a huge impact on the effected VAT taxpayer. It is foreseeable that more VAT taxpayers will prefer to purchase services from the pilot industries in Shanghai in the following year, taking account of the input VAT credit, which will definitely encourage and stimulate the development of the relevant industries in Shanghai
- the tax bureau in Shanghai has made lists of companies for the purpose of VAT reform and propose to launch tax training immediately. We suggest that clients take the initiative to contact the tax officials to confirm whether their company is on the list or not, and assess the impact of VAT reform on their business operations.

Additionally, clients are reminded to pay attention to the following two points:

1. Waiver of tax reduction or exemption
   Circular 111 stipulates that some companies could benefit from a tax reduction or exemption. However, the company is not allowed to claim input VAT as credit when benefitting from a tax exemption. Therefore, we suggest companies should take into consideration its business nature and the tax burden overall before making a decision with regards to tax exemption.
2. Export of services from China
   Circular 110 provides that the export of service will be either zero rated or exempt. Meanwhile, Circular 110 reiterates that services shall be taxed if the provider or recipient is located in China. It is possible that some of the exported pilot services will be subject to a zero rating with a VAT refund, whilst some will be exempt with no VAT refund. We look forward to a more detailed explanation regarding the export of service from China, as the Circulars currently do not offer a very clear position.

Hong Kong



Investment into China via Hong Kong with the use of Renminbi (RMB)

On 12 October 2011, the Ministry of Commerce in China issued a circular (ShangZiHan No. 889) 'Notice of Relevant Issues Relating to Cross-Border RMB Direct Investment' thereby allowing foreign investors to use legally obtained RMB overseas to make direct investment into China.

According to Circular 889, RMB obtained overseas refers to RMB acquired by foreign investors through cross-border RMB trade settlement; RMB acquired within China and remitted abroad through share transfers, capital reductions, liquidation and the early withdrawal of investment; and RMB acquired via the issuance of RMB bonds and stocks overseas.

Any such investment must be approved by the Ministry of Commerce and a series of formalities and requirements met, as set out in a People's Bank of China bulletin.

Hong Kong, being an international financial centre, has been developing its role as an RMB Offshore Centre since 2004. In the last couple of years especially, it has come a long way. For example, in April 2011, Hong Kong had its first RMB denominated initial public offering (IPO) outside China and during 2011 we have also seen numerous RMB denominated bonds being issued in Hong Kong.

In addition, a pilot programme that was launched in 2009 to allow certain companies in designated cities to trade and settle cross-border trading transactions in RMB, has since been expanded to 20 provinces and cities in China. As you can imagine, many of these foreign trade partners have maintained RMB bank accounts in Hong Kong to facilitate such trading transactions with Chinese partners. Furthermore, since July 2010, there is no longer a cap on the amount of RMB that companies in Hong Kong can purchase.

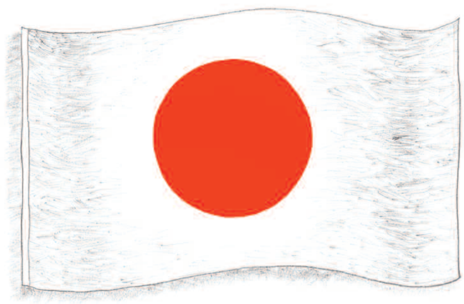
As you can see, there is a large pool of RMB capital in Hong Kong that can be tapped into for any foreign investors considering investing into the People's Republic of China (PRC). However, at the moment, Circular 889 has placed some restrictions on the RMB obtained overseas that can be used for investment purpose back into China by foreign investors. Nonetheless, it has been a major breakthrough and should help strengthen Hong Kong's role as the major RMB offshore centre.

For any foreign investors contemplating investing into China, the use of Hong Kong as the intermediate holding company should be evaluated seriously, due to Hong Kong being an international financial centre. Especially with its role as the major RMB offshore centre coupled with the fact that Hong Kong has one of the most favourable double tax arrangements with China in terms of withholding tax on interest and dividends etc. Hong Kong itself also has a very favourable tax regime with no withholding tax (except on royalty payments), a low tax rate of currently 16.5% and capital gains derived from long term investment are exempt from tax in Hong Kong.

Hong Kong and Malta sign tax treaty

On 8 November 2011, Hong Kong signed a comprehensive double tax agreement (CDTA) with the Republic of Malta. This is the 22nd CDTA concluded by Hong Kong with its trading partners, coming after those with Austria, Belgium, Brunei, the Mainland of China, Czech Republic, France, Hungary, Indonesia, Ireland, Japan, Kuwait, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Portugal, Spain, Switzerland, Thailand, United Kingdom and Vietnam.

Japan



2011 tax reforms and new taxation agreements

The past year has seen Japan sign numerous 'Tax Information Exchange Agreements', revise existing treaties and enter new ones. A broad overview is included below.

Hong Kong

The Double Taxation Agreement (DTA) between Japan and Hong Kong came into force on 15 July and applies to taxes from 1 January 2012. The headline rates are as follows:

Income type	Tax rate
Dividends: At least 10% shareholding	5%
Dividends: Other	10%
Interest	10%[1]
Royalties	5%

1 0% for interest from government bodies and financial institutions

The treaty also contains provisions allowing Japan to impose tax at source on income and gains derived from a sleeping partnership (Tokumei Kumiai).

Saudi Arabia

The treaty is one of several agreed with Persian Gulf nations in recent years. It applies to taxes from 1 January 2012 and the headline rates are as follows:

Income type	Tax rate
Dividends: At least 10% shareholding	5%
Dividends: Other	10%
Interest	10%[1]
Royalties	5%[2]/10%[3]

1 0% for interest from government bodies and financial institutions
2 For royalties relating to industrial, commercial or scientific equipment
3 For all other royalties

The treaty also contains provisions allowing Japan to impose tax at source on income and gains derived from a sleeping partnership (Tokumei Kumiai).

As with the agreements signed with Brunei Darussalam and Kuwait previously, the treaty contains a clause exempting interest paid to the Public Investment Fund, a sovereign wealth fund, from taxation in Japan.

Tax information exchange agreements

In 2011 Japan signed a 'Tax Information Exchange Agreement' with the Bahamas and the Isle of Man which came into force on 2 August 2011. In addition Japan has reached basic agreements with Jersey and Guernsey.

Finally, an agreement has been reached with the Cayman Islands in relation to the exchange of tax information and the allocation of taxing rights on individuals.

Summary

As in recent years, Japan's actions in agreeing new tax treaties will help multinational companies operating abroad. The agreement with Saudi Arabia is another sign of Japan's efforts to encourage cross border investment with resource rich countries and, in particular, investment into Japan from sovereign wealth funds.

In addition the 'Tax Information Exchange Agreements' agreed with low tax jurisdictions, will make for greater transparency and help with the sharing of taxpayer information.

Malaysia

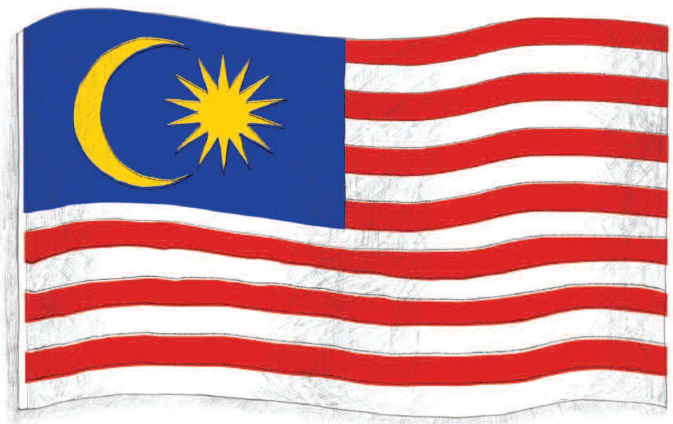
Group relief for Malaysian companies

Group relief provisions generally enable Malaysian resident companies in a group to surrender up to 70% of their adjusted loss (current year loss) for a year of assessment (YA) to one or more related 'Malaysian incorporated resident' companies within the same group. The group relief would be applicable if the surrendering company and the claimant company fulfil the following criteria and conditions:

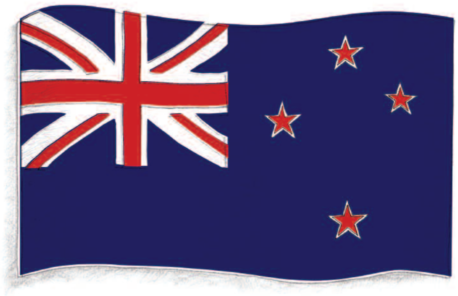
- are related companies throughout the basis period for that year of assessment and the twelve month period immediately preceding that basis period
- have paid-up capital in respect of ordinary share of more than two million five hundred thousand ringgit at the beginning of the basis period, for that year of assessment
- have twelve months basis period ending on the same day
- make an irrevocable election to surrender or claim an amount of adjusted loss (current year loss) in the return furnished for that YA under the Malaysian Income Tax Act (MITA)
- are subject to tax at the appropriate rate as specified in paragraph 2, Part I, Schedule 1 of MITA
- are not currently enjoying certain incentives such as pioneer status, investment tax allowance, reinvestment allowance, etc.

The claimant company for group relief must have a defined aggregate income for that YA. Defined aggregate income is the total income of a claimant company for that YA reduced by deduction made under the MITA.

- to be eligible for group relief, the surrendering company and the claimant company must be related companies. Under the MITA, the companies are considered related if at least:
  - 70% of the paid-up capital in respect of ordinary shares of the surrendering company is directly or indirectly (through the medium of other companies resident and incorporated in Malaysia) owned by the claimant company or vice-versa; or
  - 70% of the paid-up capital in respect of ordinary shares of the surrendering company and the claimant company are directly or indirectly owned by another company resident and incorporated in Malaysia.



New Zealand



The financial hub of the matter

The Prime Minister of New Zealand, John Key, has expressed his desire to establish New Zealand as a financial hub for the Asia Pacific region. Picturing New Zealand as the next Singapore or Hong Kong is possibly a stretch too far, although not as far as you might think, despite Australia positioning itself in the same arena. The aim is that New Zealand becomes a centre for funds domicile and funds administration, riding off the back of Australia's move as a centre for asset management services.

The changes seem relatively straight forward. Remove tax impediments, primarily by removing taxation of foreign funds in New Zealand where the investment assets are offshore, make the regulatory changes and market New Zealand to the region.

The financial benefits seem significant: revenue generation plus jobs creation, both realisable in a short space of time. However, offshore decision makers also need to come to the party.

You only need to remember the conduit tax regime introduced in the 1990s to accept a healthy load of scepticism. A conduit tax regime effectively removes New Zealand tax liability from the foreign earnings of companies resident in New Zealand, but owned by non-residents. The aim was to encourage foreign businesses to run their international empires from New Zealand.

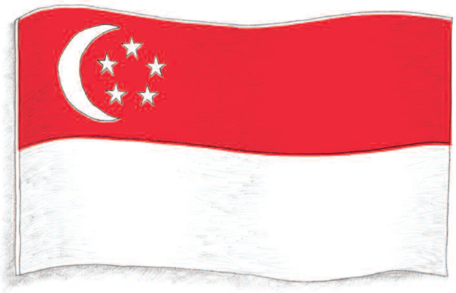
The fault of the scheme, other than New Zealand taking a withholding tax clip of the ticket rather than creating a pure pass through, was that it created no new, compelling reason to come to New Zealand. Instead, a significant number of foreign owned businesses already in New Zealand took advantage of the scheme to reduce their existing tax liability; none more so than the foreign owned banks, who were found to have crossed the line on tax avoidance by structuring their businesses to take advantage of such schemes. Needless to say the conduit regime has since been repealed.

Other negatives include the depth of expertise New Zealand has in the sector, New Zealand's remoteness of location and immature financial markets. Competition from most Asia Pacific countries means New Zealand must compete head to head to attract this market to New Zealand's shores.

New Zealand needs to make sure it does not create domestic tax problems with rule changes designed to attract foreign funds. It must also make sure no arbitrage is created between foreign businesses and domestic businesses in the same game. The New Zealand government also needs to make sure the country does not become a base of operations with no domestic tax obligations, to the detriment of other foreign tax regimes. New Zealand is already close to being regarded as a tax haven in the South Pacific, due to the trust regime, where it taxes on a settler residency basis (most other countries tax on a trustee residency basis).

That said, the international funds management market is immense. If system integrity is maintained, inroads into this market can create significant financial benefits for New Zealand. A small portion of a large number makes it very worthwhile.

Singapore



A global player in the back end data processing, storage and disaster recovery business

Payments from an Indian company to a Singapore company in relation to a hubbing agreement for data processing support provided in Singapore, are not treated as a royalty under article 12 of the India-Singapore double tax agreement (DTA).

Singapore is increasingly becoming a global player in the back end data processing, storage and disaster recovery business. Against this background, a global bank in India used the back end facility of a Singapore company that provided these services in Singapore to the Bank in India.

The Indian tax authorities attempted to argue that the bank was obliged to withhold income tax in India on the basis that these payments fell under section 9(1)(vi) of the Income Tax Act 1961 as well as article 12(3) of the India-Singapore DTA.

Section 9(1)(vi) of the Income Tax Act (the act), relates to income deemed to accrue or arise in India and provides income by way of royalty, payable by one of the following:

a) the government
b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India
c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.

In a recent case of Standard Chartered Bank v. Deputy Director of Income-tax, (International Taxation)-2(1), Mumbai, the Income Tax Appellate Tribunal (ITAT) held that payments made by Standard Chartered Bank (SCB), in consideration of data processing support could not be considered as royalty payments under Article 12 of the DTA.

Briefly, the facts are as follows. SCB, (a non-resident company), entered into a hubbing agreement with a company incorporated in Singapore, Sema Group Outsourcing (Singapore) Pte. Ltd. (SPL) to provide SCB with data processing support. In essence, the fees being paid under the agreement were for the use of disc space in the hardware of SPL at its data centre in Singapore.

The Indian tax authorities held that the amount paid by SCB to SPL was in the nature of royalty or a fee for technical services and, therefore, was taxable in India which obliged SCB to withhold income tax in India.

In fact, the Commissioner of Income Tax (appeals) upheld the decision of the assessing officer.

SCB argued that the fees paid to SPL under the agreement were not in the nature of royalty under the act, or under Article 12(3) of the India-Singapore DTA.

The act provided a lengthy definition of royalty payments which included the following.

For the purposes of this clause, 'royalty' means consideration (including any lump sum consideration) for:

i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property
ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property
iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property
iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill.

Article 12 (3) (b) of the DTA states the following:

The term 'royalties' as used in this article means payments of any kind received as a consideration for the use of, or the right to use (emphasis added):

a) any copyright of a literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information
b) any industrial, commercial or scientific equipment.

On appeal, the ITAT held that:

The payment made by SCB to SPL was in the nature of royalty under the IT Act and Article 12(3)(a) of the DTA

The ITAT noted that the fees being paid to SPL were for the use of disc space in the hardware of SPL at its data centre in Singapore. It also noted that SCB did not have any right to use any process of SPL under the agreement and that software embedded in the computer facility being used by SCB was not owned by SPL. Therefore, it could not collect any royalty for the licensing of the software.

The ITAT therefore concluded that the payment made by SCB was a payment for the use of a facility and not for the use of any process and consequently, the payment made by SCB to SPL for processing its data and not a royalty under article 12(3)(a) of the India-Singapore DTA.

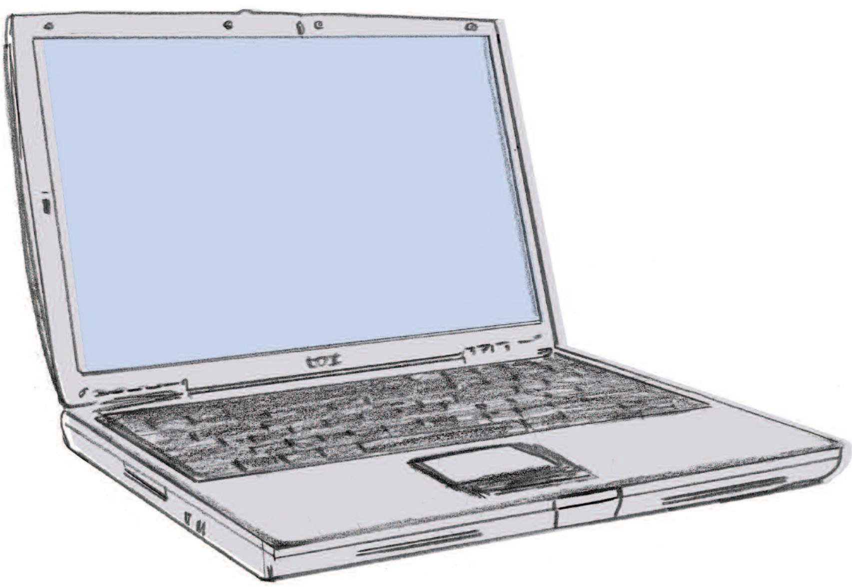
Whether the payment made by SCB to SPL was in the nature of royalty?

The ITAT considered the meaning of 'use or right to use' under article 12(3)(b) of the India-Singapore DTA implied a positive act of utilisation, application or employment of an equipment for a specified purpose.

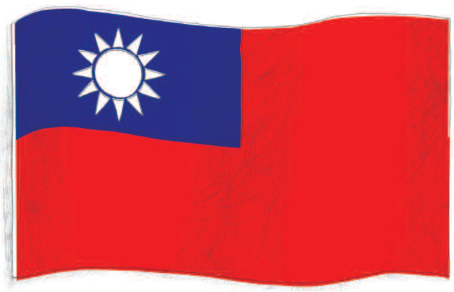
In this case:

1. SCB used the data centre in Singapore for data processing
2. SCB was not able to exercise any control over the computer equipment or hardware and had no possessory rights
3. SCB merely used the facility and not the equipment and there was nothing to suggest that the hardware could be accessed by SCB.

On the basis of these facts and interpretation, the ITAT held that the payments by SCB to SPL were not royalty payments under the meaning and definition of Article 12(3) (b) DTA.



Taiwan



Announcement of Safe Harbour Rules under Thin Capital assessment rules

The Safe Harbour Rules under the Thin Capital rules (Tax Ruling Tai-Tsai-Suei No. 10000367210) were announced on 26 September 2011. For computing the intercompany debt to equity ratio, the following need to be taken into account:

- under any one of the following circumstances, the inter-company debt of an enterprise does not need to be capped at 3:1, nor shall the enterprise be obligated to disclose information related to its inter-company debt in the corporate income tax return:
  - where the annual aggregate amount of net sales and non-operating income reported in the corporate income tax return is less than or equal to New Taiwan dollar (NTD) 30 million; or
  - where both ‘total interest expense’ and ‘interest expense from inter-company debt’ reported in the corporate income tax return are less than or equal to NTD 4 million; or
  - where tax loss has incurred prior to the deduction of interest expense, and such loss is not carried-forward as provided under Article 39 of the Income Tax Act (ITA).
- where the interest expense is capitalised or deferred, the underlying inter-company debt which is separately identifiable can be excluded from the inter-company debt to equity ratio calculation. However, if the underlying inter-company debt cannot be separately identifiable from the capitalised/deferred interest expense, the amount attributed thereof shall be determined using a pro-rata formula.

  For example, assuming that company A obtains a loan of $100 million from its related party with an interest rate of 2% per annum in 2011, and the interest expense incurred in 2011 amounts to $2 million:

  Scenario 1
  Where the interest expense of $2 million needs to be capitalised, the loan of $100 million will be wholly excluded from the inter-company debt to equity ratio calculation.

  Scenario 2
  Where the amount of capitalised interest expense is $1.5 million and the underlying inter-company debt cannot be separately identifiable, the inter-company debt of $75 million, i.e. [($1.5 million/$2 million) ×$100 million], will be excluded from the inter-company debt to equity ratio calculation, whereas the remaining balance of $25 million shall be deemed ‘inter-company debt’ and included in the inter-company debt to equity ratio calculation.
- loans provided by third-party financial institutions but guaranteed by related parties due to request from the said financial institutions may be excluded from the inter-company debt to equity ratio calculation if the enterprise can present evidential documents substantiating that such loans can be completely guaranteed by self-owned assets of the enterprise.

Taiwan and Slovakia sign tax treaty

Taiwan signed its 22nd bilateral DTA with Slovakia on 24 September 2011.

Currently, 20% withholding tax is levied on dividends, interest and royalties paid to foreign companies with no DTA protection. Effective from 1 January 2012, the Taiwan-Slovakia DTA will reduce withholding tax rates on dividends, interest and royalties as follows:

- dividends and interest: 10%
- royalties: 10% in general
- 5% for royalties for the use of (or the right to use) industrial, commercial or scientific equipment.

Thailand

Thai government responses to flooding disaster

Due to the severe flooding that hit parts of Thailand for the past several months, including certain areas in Bangkok, a number of manufacturers and exporters risk being assessed for duties, interest and penalties by the customs department as a result of damage incurred to machinery and equipment as well as imported raw and essential materials. Fortunately, the Thai government has recently issued announcements that address these risks.

Board of Investment (BOI)

Imported machinery and equipment

- move the assets out of the factories to another location in emergency cases
- for the replacement of damaged machinery, a six-month extension to import machinery, free of import duty.

Raw materials

- move raw materials to another location
- imported raw materials that have been damaged by the flood can be written-off as part of allowance for manufacturing waste, free of customs duty and VAT
- BOI promoted companies can temporarily outsource manufacturing process so as to avoid interruption in the operations.

Duty-free zone, export processing zone and bonded warehouse

The customs department has issued a 'Special Customs Measures for Flood Relief' allowing the impacted businesses to move their operations to temporary workplaces.

The customs department must be notified of the new location.

Manufacturing operations can be undertaken in the temporary location, although located outside of the duty-free zone, etc. without loss of customs incentives.

Other measures:

- exemption from income tax for companies and individuals who receive government donations and subsidies
- subsidies from other sources are also exempt from income tax up to the amount of actual losses
- exemption from income tax for insurance compensation received in excess of the net book value of the assets covered
- certain other incentives for assisting with the flood relief.

Reduction of corporate income tax rate from 2012 onwards

Approval to reduce the corporate income tax rate in 2012

In order to increase the country's competitiveness in the region, the Thai Cabinet has approved the proposal from the Ministry of Finance to reduce the 30% corporate income tax rate on net taxable income to 23% for 2012 and 20% thereafter.

Vietnam

Multiple regulation changes take place in Vietnam

Listing prices in foreign currencies

Recently issued Decree 95 has stipulated a number of instances in which companies may be subject to administrative fines. Of these fines, one of the most concerning for multinational businesses is the fine applicable to entities that are found to be advertising or listing prices in currencies other than Vietnamese Dong without being registered for such activity with the State Bank of Vietnam. Details of the eligibility requirements and the mechanism for registering with the State Bank have yet to be released.

Tax incentives for small and medium enterprises (SMEs)

On the 4 November 2011, Decree 101/2011/ND-CP was released, providing detailed guidance on the implementation of Resolution 8/11. The Decree specifies which entities are eligible as SMEs to tax incentives for corporate income tax and value added tax in 2011. In addition, the Decree also specifies a number of incentives for individuals.

Foreign employment regulations

Circular 31 guiding the employment and administration of expatriate individuals working in Vietnam was released on 3 November 2011 to supplement Decree 46. In addition to greater clarity on work permit requirements and extension procedures, Circular 31 also provides more detail following the requirement in Decree 46 for expatriate staff to be replaced with local employees. Under Decree 46, plans should be made in order to train local staff and phase-out foreign employees.

In addition, the Circular also provides declaration requirements, and a number of standardised forms for foreign contractors tendering bids on projects in Vietnam. In addition, the contractors will be required to provide details of foreign employees, including nationality, qualifications and work permit status.

The Circular also amends some cases as to when work permits are required and when they are not.

About Asia Pacific tax newsletter

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