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Malaysian developments

- Amendment to flexible work arrangement benefits
- Amendment to deduction from remuneration rules
- Extension of application for tax incentive under the Returning Expert Programme

Overseas developments

- Dutch Government releases legislative proposal introducing withholding tax on dividend payments to low-tax jurisdictions, hybrid entities or in certain abusive situations as of 2024
- Greece's tax authority issues guidance on COVID-19 and transfer pricing

Malaysian developments

Amendment to flexible work arrangement benefits

As highlighted in an earlier tax alert, the following Order and Rules were gazetted on 26 January 2021. The Order and Rules stated that they were effective for the year of assessment (YA) 2020 (see *Tax Alert No. 3/2021*).

- Income Tax (Exemption) Order 2021 [P.U.(A) 30]
  The Order provides that in ascertaining the gross income from employment for a YA, an employee is exempted from the payment of income tax on the value of benefit (in the form of a smartphone, tablet or personal computer) received from his employer. The value of benefit that can be claimed for tax purposes is capped at RM5,000.

- Income Tax (Deduction for Value of Benefit given to Employees) Rules 2021 [P.U.(A) 31]
  The Rules provide that in ascertaining the adjusted income of a Malaysian resident from his business for a YA, a deduction shall be allowed for the value of benefit (for the purchase of a smartphone, tablet or personal computer) given to his employee.

Following the above, the Amendment Order and Amendment Rules outlined below were gazetted on 25 March 2021 to stipulate that the Order and Rules will be effective from YA 2020 instead of for only YA 2020:

- Income Tax (Deduction for Value of Benefit given to Employees) (Amendment) Rules 2021 [P.U.(A) 133]
- Income Tax (Exemption) 2021 (Amendment) Order 2021 [P.U.(A) 134]

Amendment to deduction from remuneration rules

The Income Tax (Deduction from Remuneration) Rules 1994 (Amendment) 2021 [P.U.(A) 123] were gazetted on 19 March 2021 and amend the Income Tax (Deduction from Remuneration) Rules 1994 [P.U.(A) 507].

The Income Tax (Deduction from Remuneration) Rules 1994 provide that the employer must determine and make monthly tax deductions (MTD) from employees' salaries based on either the MTD Schedule or the computerized calculation method. The Schedule is issued to employers who do not use a computerized payroll software. However, employers using the Schedule are advised to use the computerized calculation method if the employee receives a salary adjustment, elects for optional deductions or commences employment other than in January.

The 2021 amendments take into account the following:

1. The tax rate reduction of one percentage point, from 14% to 13%, for resident individuals with chargeable income between RM50,001 and RM70,000. This is effective from YA 2021.

2. The "life insurance premium" component is excluded from the formula in determining the amount of monthly tax deduction, effective from YA 2019.

3. The amendment rules stipulate that the minimum amount of monthly tax deduction based on the computerized calculation is RM10, effective from 1 January 2021.

4. The amendment rules stipulate that the "Table of Monthly Tax Deduction" will be issued by the Inland Revenue Board (IRB) in an electronic medium. This is deemed to have come into operation on 1 March 2019.

Extension of application for tax incentive under the Returning Expert Programme

In Budget 2021, it was proposed that the application period for the Returning Expert Programme (REP) be extended for a further three years, until 31 December 2023 (see *EY Take 5: Malaysia Budget 2021*). The REP is a programme managed by Talent Corporation Malaysia Berhad to encourage professional Malaysian citizens working overseas to return to work in Malaysia. Approved applicants under the REP will be subject to tax on their employment income at the rate of 15%.

This proposal has now been legislated via the Income Tax (Determination of Approved Individual and Specified Year of Assessment Under the Returning Expert Programme) (Amendment) Rules 2021 [P.U.(A) 147] gazetted on 30 March 2021.

Overseas developments

Dutch Government releases legislative proposal introducing withholding tax on dividend payments to low-tax jurisdictions, hybrid entities or in certain abusive situations as of 2024

On 25 March 2021, the Dutch Government published a legislative proposal introducing a withholding tax (WHT) on dividend payments to low-tax jurisdictions, effective 1 January 2024. The WHT will also apply in the case of abusive situations and is an extension to the already enacted WHT on interest and royalty payments to low-tax jurisdictions or abusive situations. The WHT rate is equal to the headline corporate income tax rate, which is currently 25%. This WHT will exist together with the "normal" dividend WHT of 15%, although an anti-cumulation rule will apply, effectively limiting the total tax on dividends to low-tax jurisdictions, hybrid entities or abusive situations to 25%.

The implications of the proposed legislation must be carefully assessed on a case-by-case basis.

Detailed discussion

WHT on dividends

If enacted, a WHT of 25% will be introduced as of 1 January 2024 on dividends (deemed) paid by a Dutch corporate taxpayer to a related entity resident if:

- That entity is resident in a low-tax jurisdiction, which is:
  - A jurisdiction with a statutory tax rate lower than 9%
  - A jurisdiction that is included in the European Union (EU) list of non-cooperative jurisdictions
  - Another jurisdiction whereby the entity allocates the dividends to a permanent establishment in a jurisdiction with a statutory tax rate lower than 9% or in a jurisdiction that is included in the EU list of non-cooperative jurisdictions
- That entity is a hybrid entity; or
- The entity is part of an abusive structure (in short, a structure aimed at avoiding the WHT and which is artificial).

Low-tax jurisdiction or EU list of non-cooperative jurisdictions

Payments to affiliated entities resident in a jurisdiction with a statutory tax rate lower than 9% (a low-tax jurisdiction) or a jurisdiction in the EU list of non-cooperative jurisdictions (the EU List) are in scope of the conditional WHT. The Dutch Government publishes a list at the end of each year with jurisdictions that qualify as low-tax jurisdictions or are included in the EU List at that time. Only jurisdictions that are included in that list for the preceding calendar year are in scope for the conditional WHT.

Hybrid entities

Hybrid entities are entities that are considered transparent for one jurisdiction and non-transparent for another jurisdiction. An example is the situation in which a Dutch company distributes dividends to an entity that is transparent in the jurisdiction under which laws it is formed, but non-transparent according to the jurisdiction where the participant in the entity is resident.

Abusive situations

The WHT may also apply to dividend payments in certain abusive situations, including (deemed) payments to intermediate holding companies. For example, in the case of an intermediate holding company located in a non-low tax jurisdiction that is considered a conduit (e.g., that lacks economic substance) between the Dutch company distributing the dividends and a (ultimate) recipient in a low-tax jurisdiction. Having relevant substance in such a conduit company provides a presumption of proof that the arrangement is not abusive.

Affiliated entities

The WHT is due on payments to affiliated entities. Entities will be considered affiliated in the following cases:

- One entity directly or indirectly holds a qualifying interest in the other.
- A third entity directly or indirectly holds a qualifying interest in both entities.
- One entity, together with a cooperating group of shareholders, holds a qualifying interest in the other.
- A cooperating group of shareholders holds a qualifying interest in both entities.

An interest is "qualifying interest" when a holder of such interest can exercise control over decisions of the entity.

This should be determined based on the relevant facts and circumstances. An interest representing 50% or more of the statutory voting rights will normally be a qualifying interest, but lower interest percentages can also result in a qualifying interest being present. Whether a group of shareholders qualify as a cooperating group of shareholders depends on the facts and circumstances, such as coordinated group decisions.

Definition of dividends

The WHT is due on (deemed) distributions out of profit, profit reserves or equivalent payments. This is generally in line with the Dutch Dividend Withholding Tax 1965.

The WHT obligation is due when a dividend is declared and payable.

Tax rate

The rate of the WHT equals the headline corporate income tax rate, currently a rate of 25%. Credit is given for Dutch dividend WHT (anti-cumulation).

Timing and next steps

The proposal is currently under review by the Dutch Parliament and is subject to the regular parliamentary proceedings. No further details have been announced yet on the timeline and when this proposal will be discussed by the Dutch Parliament.

Greece tax authority issues guidance on COVID-19 and transfer pricing

Following the relevant Organisation for Economic Co-operation and Development (OECD) Guidelines, the Greek Independent Authority for Public Revenue (IAPR) has proceeded with the issuance of Circular E. 2054/10.03.2021 to provide guidance on the transfer pricing implications of the COVID-19 pandemic (the Guidance).

The Guidance addresses four key issues analyzed in the OECD Guidelines, including:

- Comparability analysis
- Losses and the allocation of COVID-19 specific costs
- Government assistance programs
- Advance Pricing Agreements (APAs)

The Guidance issued by the IAPR essentially constitutes a concise summary of the OECD Guidance and is a positive step towards strengthening local transfer pricing rules by demonstrating that the local tax authorities understand the unprecedented effects of the pandemic on the economic environment.

The provisions on the four key issues are summarized below.

Detailed discussion

Comparability analysis

Guidance is provided for performing a comparability analysis, i.e., how the taxpayer should determine the

existence or non-availability of comparable data and/or determine the potentially comparable transactions or activities.

- For the purpose of the comparability analysis of controlled transactions for the fiscal year (FY) 2020, information on the impact of the pandemic on the controlled transactions can be drawn indicatively from: (i) changes in the sales volumes; (ii) comparison of the budgeted or forecasted and actual sales data; (iii) costs and profit margins; (iv) information on the incremental or exceptional costs borne by the parties to the controlled transactions or by the Multinational Enterprise (MNE) group as a whole; and (v) comparison of industry data relating to the effects on sales, costs and profitability.
- Given the unique and unprecedented nature of the COVID-19 pandemic and its effect on economic conditions, a comparability analysis that is based on information from a prior financial crisis (e.g., 2008/2009) is not recommended.
- The application of more than one transfer pricing method may prove useful without, however, being required.
- While the principles outlined in the OECD Guidelines regarding the use of multiple year data and averages remain applicable, it may be appropriate to refer to separate testing periods for the transactions that took place during the pandemic as long as this is justified for comparability purposes.
- When a taxpayer rolls forward an existing set of comparables to cover FY2020, the appropriateness or comparability of such existing comparables should be reviewed in the course of the benchmarking update process.
- Loss-making comparables that satisfy the comparability criteria may be appropriate to be included in the set of comparables.

It is noted that any comparability adjustments should be quantified and adequately justified in terms of their appropriateness and necessity.

Losses and the allocation of COVID-19 specific costs

Limited risk entities

It is provided that limited risk entities generating losses may be in line with the arm's-length principle, to the extent that this accurately reflects the functional analysis and more specifically, the allocation of risks between the parties to an arrangement. Consideration should be given to whether a company is taking consistent positions on the allocation of functions and risks pre- and post-pandemic.

Contractual arrangements

To the extent that it is demonstrated that this reflects third-party behavior under comparable circumstances, related parties could seek to renegotiate their intercompany agreements and/or their conduct in their commercial relationships, or invoke force majeure clauses in order to suspend or defer or be released from the obligations arising from the latter. It is explicitly stated that the existence of a COVID-19 force majeure clause is insufficient and the basis for renegotiation should be adequately justified.

Exceptional costs

A similar approach should be followed when determining how exceptional costs arising from the COVID-19 pandemic should be allocated between related parties - they should be borne by the party assuming the respective risks and functions. Moreover, guidance is provided on which costs may be considered exceptional and not recurring operating expenses on potential adjustments for accounting purposes to address exceptional costs, as well as on the issue of cost recharges without the application of a mark-up in the context of the comparability analysis.

The relevant interpretation of the treatment of exceptional costs and accounting adjustments constitutes a positive development as these items are sometimes questioned during tax audits.

Government assistance programs

Government assistance programs are considered part of the market conditions and an indication of the economic conditions in which businesses operate. Therefore, they should be part of the transfer pricing documentation and should be analyzed both in the context of the functional and comparability analyses for the identification of comparable companies (e.g., for purposes of determining the geographical criterion; for performing comparability adjustments; for addressing any differences in the accounting treatment of government assistance by the tested party, as well as the comparable companies).

APAs

Acknowledging the potential impact of the COVID-19 pandemic in the context of APAs, the Guidance encourages taxpayers and tax authorities to adopt a constructive and collaborative approach to resolving relevant issues as summarized below.

In relation to existing APAs

Unless a condition leading to the cancellation or revision of the APA has occurred, existing APAs and their terms should be respected, maintained and upheld by the parties. A revision or cancellation may be an appropriate response where there has been a material change in the conditions noted in a critical assumption in the APA. In such cases, the APA may be revised for the period and the covered transactions that are materially affected by the COVID-19 pandemic.

Where a company considers that material changes in economic conditions have led to the breach of one or more of the critical assumptions, it should notify the tax authority in a timely and justified manner (the Guidance issued provides for indicative documentation in this respect).

In relation to APAs under negotiation

Companies may request the revision of filed APA applications so long as this is justified. Furthermore, consideration could be given to filing a separate APA application covering the COVID period, or including a clause permitting the revision of the agreement on an annual basis.

Implications

The consequences of the COVID-19 pandemic on the transfer pricing obligations of businesses for FY2020 as well as for subsequent fiscal years constitute a complex exercise and the guidance of IAPR provides useful guidelines for the analysis of some of the main effects of the COVID-19 pandemic on intra-group transactions. Thus, companies should consider one or more of the following actions in a timely manner:

- Review their transfer pricing policies
- Confirm, through the transfer pricing in place, that the economic effects of the pandemic are properly allocated among the group entities and that the current transfer pricing documentation approach remains appropriate
- Confirm that the profitability of the tested party is appropriately calculated
- Evaluate the necessary actions vis a vis existing or ongoing APAs

All the above should be considered in the light of the obligation of MNEs to present consistent transfer pricing positions pre- and post-pandemic.

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Important dates

15 April 2021	Due date for monthly instalments
30 April 2021	6th month revision of tax estimates for companies with October year-end
30 April 2021	9th month revision of tax estimates for companies with July year-end
30 April 2021	Statutory deadline for filing of 2020 tax returns for companies with September year-end
15 May 2021	Due date for monthly instalments
31 May 2021	6th month revision of tax estimates for companies with November year-end
31 May 2021	9th month revision of tax estimates for companies with August year-end
31 May 2021	Statutory deadline for filing of 2020 tax returns for companies with October year-end

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