Building a better working world

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Malaysian developments

Remission of stamp duty on contract notes for the trading of listed shares or stocks

Effective from 1 January 2022, the stamp duty on contract notes for the trading of listed shares or stocks was increased from 0.1% to 0.15% and capped at RM1,000, instead of the previous cap of RM200 (see *Special Tax Alert No. 1/2022* and *Tax Alert No. 8/2022*). Prime Minister and Finance Minister Datuk Seri Anwar Ibrahim announced last month that the stamp duty rate would be reduced back to 0.1%, effective July 2023.

To legislate this, the Stamp Duty (Remission) (No. 3) Order 2023 [P.U.(A) 208] was gazetted on 12 July 2023. The Order reduces the stamp duty on contract notes for the trading of listed shares or stocks to 0.1% and caps the stamp duty at RM1,000. The Order is applicable to contract notes executed from 13 July 2023 to 12 July 2028. The Stamp Duty (Remission) Order 2022 [P.U.(A) 2022 is also revoked.

Overseas developments

OECD releases outcome statement on the progress of Pillars One and Two of BEPS 2.0 project

On 12 July 2023, at the conclusion of the 15th meeting of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS), the Organisation for Economic Co-operation and Development (OECD) released a statement reflecting the agreement reached by 138 of the 143 Inclusive Framework member jurisdictions on the remaining elements of their project on addressing the tax challenges of the digitalization of the economy (the BEPS 2.0 project).

The July 2023 statement summarizes the Inclusive Framework deliverables in four areas:

a) The Multilateral Convention (MLC) on Amount A of Pillar One
b) Amount B of Pillar One
c) The Subject to Tax Rule (STTR) under Pillar Two
d) Plan for implementation support

The July 2023 statement will be delivered to G20 Finance Ministers and Central Bank Governors at their meeting in Gandhinagar, India on 17-18 July.

Detailed discussion

Background
In October 2021, the OECD released a statement reflecting the high-level agreement of Inclusive Framework member jurisdictions on the core design elements of Pillars One and Two of the BEPS 2.0 project. Since that agreement was reached, the Inclusive Framework has released a series of significant agreed documents on the global minimum tax under Pillar Two, including the Model Global Anti-Base Erosion (GloBE) Rules, Commentary to the Model GloBE Rules, guidance on GloBE Safe Harbors and GloBE Administrative Guidance. The OECD also released working drafts on the nexus and profit allocation rules under Pillar One, as well as the administrative aspects of Pillar Two, in the form of consultation documents. These working drafts did not yet reflect the consensus agreement in the Inclusive Framework and were released to obtain input from stakeholders.

July 2023 statement
The July 2023 statement provides an update on the progress of the remaining work on Pillars One and Two. The statement has been agreed by 138 members of the Inclusive Framework on BEPS. Canada, Belarus, Russia, Pakistan and Sri Lanka are not included in the list of members that have approved the statement. However, Kenya and Nigeria, which did not join the October 2021 statement, are now part of this latest statement.

MLC on Amount A of Pillar One
The July 2023 statement indicates that the Inclusive Framework has developed a text of the MLC for Pillar One Amount A, setting out the substantive features necessary for it to be prepared for signature and including several provisions designed to address the particular circumstances of developing countries. The MLC will be accompanied by an Explanatory Statement setting out the common understanding. However, the statement indicates that a few jurisdictions have raised concerns about specific items in the MLC and efforts are underway to resolve these issues with the aim of preparing the MLC for signature expeditiously. According to the statement, the MLC will be opened for signature in the second half of 2023 and a signing ceremony will be arranged by year-end. The statement further references the objective of having the MLC enter into force in 2025.

The July 2023 statement also addresses the current standstill agreement on imposing newly enacted digital services taxes (DSTs) and similar measures, which runs through 31 December 2023. Under this statement, subject to the condition that at least 30 jurisdictions, representing a minimum of 60% of the Ultimate Parent Entities of in-scope Multinational Enterprises, sign the MLC before the end of 2023, Inclusive Framework members have agreed to refrain from imposing newly implemented DSTs or similar measures on any company during the period between 1 January 2024 and 31 December 2024 (or the date the MLC enters into force, if earlier). In addition, the statement indicates that if sufficient progress is made toward implementing the MLC by the end of 2024, Inclusive Framework members may agree to extend this deadline to the earlier of 31 December 2025 or the date the MLC enters into force.

Amount B of Pillar One

The July 2023 statement indicates that the Inclusive Framework recognizes that Amount B is a critical component of the broader agreement on Pillar One and therefore has reached consensus on many aspects of the Amount B framework. However, to ensure the appropriateness of the scope and pricing framework, further work will be undertaken on specific aspects:

- An appropriate balance between a quantitative and qualitative approach for identifying baseline distribution activities
- The appropriateness of the pricing framework, the application to wholesale distribution of digital goods, country uplifts within geographic markets, and the criteria for using a local database in certain jurisdictions

A public consultation on this further work on Amount B will be launched during the week of 17 July 2023, with comments to be submitted by 1 September 2023.

The July 2023 statement further indicates the intention that the Inclusive Framework will approve and publish a final Amount B report by year-end and that Amount B will be incorporated into the OECD Transfer Pricing Guidelines by January 2024. In this regard, consideration will be given to both the needs of low-capacity jurisdictions and the interdependence with the signing and entry into force of the MLC. According to the statement, the timeline implementing Amount B will take into account both these considerations and the time that some jurisdictions will need to adopt relevant legislative changes and businesses will need to prepare.

Part III — STTR under Pillar Two

The July 2023 statement indicates that the STTR is an integral part of the consensus on Pillar Two for developing countries in the Inclusive Framework. Work has been completed on an STTR model provision and commentary for incorporating it into bilateral tax treaties. The STTR will apply to intra-group interest, royalties and a defined set of other intra-group payments that includes all payments for intra-group services. The STTR is subject to certain exclusions and materiality and mark-up thresholds, and it will be administered through an ex-post annualized charge.

The July 2023 statement further indicates that work also has been completed on a Multilateral Instrument (MLI) together with an Explanatory Statement to facilitate implementation of the STTR, which will be open for signature from 2 October 2023. Inclusive Framework members can elect to implement the STTR by signing the MLI or bilaterally amending their tax treaties to include the STTR when asked to do so by developing countries that are members of the Inclusive Framework.

These agreed documents relating to the STTR will be published during the week of 17 July 2023.

Plan for implementation support

The July 2023 statement indicates that the Inclusive Framework has called upon the OECD Secretariat to prepare an action plan to support the coordinated implementation of Pillars One and Two. In particular, the plan should provide support and technical assistance to developing countries in coordination with relevant regional and international organizations.

Implications

The July 2023 statement reflects the progress made in the Inclusive Framework's work on Pillars One and Two. However, work is still ongoing in significant areas. It is important for companies to follow Inclusive Framework developments as they unfold in the coming weeks and months to evaluate the potential implications for their businesses. In addition, companies will need to monitor implementation activity in relevant countries. Companies may also want to take the opportunity to engage with policymakers as the work on design and implementation advances.

European Commission adopts rules for implementing the Foreign Subsidies Regulation (FSR)

On 10 July 2023, the European Commission (the Commission) adopted rules for implementing the Foreign Subsidies Regulation (the Implementing Regulation). This follows the FSR's adoption by the Member States and the European Parliament in June 2022 and a public consultation on the draft implementing rules launched in February 2023. The Implementing Regulation details procedural aspects of the implementation of the FSR. It also contains notification forms for concentrations involving foreign financial contributions and for foreign financial contributions in public procurement procedures.

The FSR aims to prevent distortions of the European Union's (EU's) internal market that arise as a result of subsidies from foreign (non-EU) countries. It can apply to EU as well as non-EU businesses that receive such foreign subsidies. The term "subsidies" is defined broadly and includes contributions, loans, grants, guarantees and tax benefits. The Regulation focuses on public procurement procedures and merger and acquisition (M&A) transactions (concentrations) that meet certain thresholds in size and amount of foreign subsidies. If these thresholds are met, there is a notification requirement (with standstill obligation) that must be met before closing a transaction or rewarding a contract in a public procurement procedure, as well as further scrutiny by the Commission.

Other market distortions are also in-scope; hence, the Regulation could also apply to smaller acquisitions under the threshold, for example. The Commission can impose a range of redressive measures to address distortions, including requiring repayment of the foreign subsidy.

The FSR is directly applicable as of 12 July 2023 and the notification requirements commence on 12 October 2023.

Detailed discussion

Background

On 7 May 2021, the Commission published a proposal for the Regulation, following an earlier white paper, dated 17 June 2020. The Council and the European Parliament subsequently reached a provisional agreement on the Regulation, which was published on 30 June 2022. The European Parliament voted in favor of the Regulation on 11 November 2022. On 16 November 2022, the Council (together with the European Parliament) published an updated version of the proposal for the Regulation. On 28 November 2022, the Council of the EU formally adopted the Regulation in accordance with the ordinary legislative procedure. Later, on 6 February 2023, the Commission launched a public consultation on the draft Implementing Regulation with a deadline on 6 March 2023. More recently, in June 2023, the Commission published a non-binding Q&A on various aspects of the Regulation.

The adoption of the Regulation and the Commission's new powers over other countries should be considered in the context of the growing attention for the EU's trade relationship with non-EU countries. In this context, the Commission has raised concerns about distortions of the EU's internal market caused by market participants from outside the EU. For example, procurement bids may be awarded to non-EU competitors because of subsidies and there are concerns that non-EU companies may leverage foreign subsidies to acquire EU companies. This is especially sensitive if the acquired companies are active in the high-tech, infrastructure or pharmaceutical sectors.

The EU already has a comprehensive set of rules against EY Member States providing distortive State aid. The Commission is responsible for the monitoring and enforcing these rules. For example, in recent years the Commission launched various high-profile State aid investigations in the area of direct taxation. The Regulation essentially expands the scope of the existing State aid rules to also cover State aid provided by non-EU countries, closing an enforcement gap and leveling the playing field.

Implementing Regulation and notification forms
On 10 July 2023, the Commission adopted the long-awaited FSR Implementing Regulation along with two annexes including the notification forms. The Implementing Regulation details the reporting obligations of notifying parties, specifying the information that needs to be included in the notification forms for concentrations and public procurement procedures.

During a public consultation that took place earlier this year, many businesses and business groups raised concerns on the compliance burden arising from the FSR. According to the Commission's press release, the Implementing Regulation addresses respondents' requests to limit the administrative burden related to notifications by only requesting detailed information on foreign financial contributions most likely to cause distortion.

More specifically, for concentrations, companies must report:

- For foreign financial contributions that the FSR considers to be the most likely to distort the internal market, detailed information on all financial contributions of an individual amount of at least €1 million, granted to the parties to the transaction over the past three years; these distortive contributions include those (i) granted to ailing undertakings, (ii) directly facilitating a concentration or unlimited guarantees, and (iii) known as "Article 5 financial contributions"
- For all other foreign financial contributions, an overview of financial contributions granted to the notifying party/parties over the past three years, of an individual amount of a least €1 million and in relation only to countries that have granted to the parties to the transaction at least €45 million over the three years before the concentration, subject to a number of exceptions

For foreign financial contributions in public procurement procedures, companies must report:

- For foreign financial contributions, detailed information on all financial contributions falling under Article 5 of at least €1 million individually granted to the notifying party/parties in the three years prior to the notification
- For all other foreign financial contributions, an overview of financial contributions granted to the notifying party/parties of an individual amount of a least €1 million and in relation only to countries that have granted each notifying party/parties at least €4 million per country over the three years prior to the notification.

The Implementing Regulation also includes guidance and more details on the following:

- Notification procedures, including the person entitled to submit a notification and the effective date of notification
- The Commission's investigation process

- The procedural rights of the parties regarding the protection of confidential information, access to files and submission of observations
- The calculation and suspension of time limits for the provision of information and submission of commitments
- The transmission and signature of documents by notifying parties to the Commission through digital means, where relevant

Next steps

The FSR entered into force on 12 January 2023 and applies from 12 July 2023. The Regulation is directly applicable in the EU without transposition into the domestic laws of EU Member States. As of 12 October 2023, companies will be required to notify concentrations and participations in public procurement procedures involving foreign financial contributions and meeting the relevant notification thresholds.

Implications

The Implementing Regulation focuses on the procedural aspects of the FSR and provides insights on the filing obligations of parties responsible for submitting the notification (notifying parties). It thus requires close attention in light of the forthcoming notifications and application of the rules.

More broadly, the FSR essentially results in an extraterritorial effect on EU State aid rules in certain situations. The FSR will have a significant impact for businesses that receive foreign subsidies and seek to invest in the EU or participate in public procurement processes, warranting a timely analysis of the rules. This includes non-EU businesses as well as EU businesses that receive subsidies from foreign countries.

Businesses should review whether they have received or anticipate receiving contributions that may be in-scope, including tax incentives provided by third-country governments. This is particularly relevant not just for businesses involved in any (future) bids in EU public procurement and/or M&A processes involving the EU, but also for other business activities in the EU involving foreign subsidies. For M&A specifically, businesses must consider to what extent the FSR is already reflected in the M&A process (tax due diligence) for current and future transactions. As a notification requirement under the FSR for a specific transaction will likely be in addition to a merger filing under the EU Merger Regulation, timely preparing the separate filings will be key. It is also recommended to assess readiness, especially as data may be required during FSR procedures with a quick turnaround.

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Important dates

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

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