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EY Tax Alert

Vol. 24 – Issue no. 11
31 May 2021

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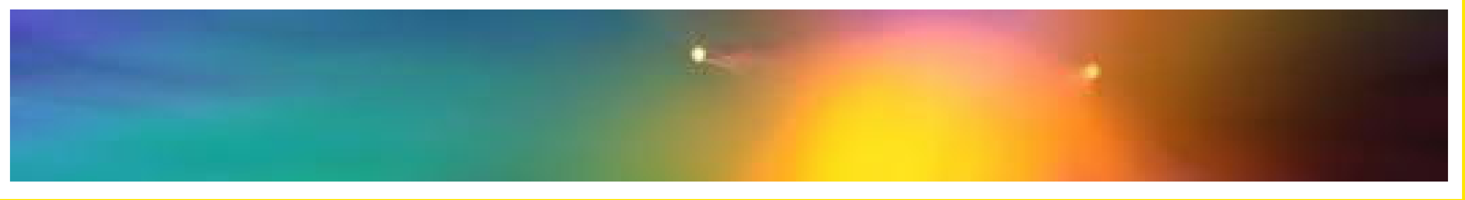
- Philippines streamlines process for claiming tax treaty benefits

Malaysian developments

Amended guidelines on deductions for secretarial fees and tax filing fees

The Inland Revenue Board (IRB) has published on its website amended guidelines dated 11 May 2021 on tax deductions for secretarial and tax filing fees. The guidelines are in Bahasa Malaysia and are titled "Pindaan Garis Panduan Potongan Bagi Perbelanjaan Berhubung Dengan Yuran Kesetiausahaan Dan Yuran Pemfailan Cukai Mulai Tahun Taksiran 2020" (Guidelines). The new 12-page Guidelines replace the earlier guidelines dated 18 September 2020 (see *Tax Alert No. 17/2020*).

The new Guidelines are broadly similar to the earlier guidelines. The Guidelines have been amended, however, to provide additional examples to demonstrate the methodology of ascertaining the total tax deduction for secretarial and tax filing fees for a specific year of assessment (YA) based on the application of both Rules outlined below:



- Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2014 [P.U.(A) 336/2014] which provide that expenses incurred on secretarial and tax filing fees are given a tax deduction of up to RM5,000 and RM10,000 respectively for each YA

- Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2020 [P.U.(A) 162/2020] which provide that expenses incurred on secretarial and tax filing fees are given a tax deduction of up to RM15,000 per YA (i.e. the tax deduction limit for both secretarial and tax filing fees are combined). These Rules revoke P.U.(A) 336/2014 and are effective from YA 2020.

Malaysia's double tax agreement (DTA) with Ukraine

On 4 August 2016, Malaysia signed a new double tax agreement (DTA) with Ukraine for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. On 7 May 2021, pursuant to Section 132(1) of the Income Tax Act 1956 (ITA) and Section 65A(1) of the Petroleum (Income Tax) Act 1967, the Double Taxation Relief (The Government of Ukraine) Order 2021 [P.U.(A) 223] was gazetted. The new DTA will come into force in the tax year following the calendar year in which the relevant ratification procedures are completed.

Updated guidelines on compensation for late refund of overpayment of tax

The IRB has published on its website Operational Guidelines No. 2/2021 (Operational Guidelines) dated 21 May 2021. The Guidelines are in Bahasa Malaysia and are titled "Garis Panduan Pampasan Kerana Kelewatan Memproses Bayaran Balik Lebihan Bayaran Cukai Pendapatan". This new six-page Operational Guidelines replace the earlier Operational Guidelines No. 1/2014 dated 15 May 2014 (see *Tax Alert No. 12/2014*).

The new Guidelines are broadly similar to the earlier guidelines and provide clarification on the compensation for overpayment of taxes under Section 111D of the ITA, where taxpayers who file their tax return for a YA by the due date will be eligible for a compensation of 2% per annum on any tax overpaid (to be computed on a daily basis after 90 days from the due date for e-Filing and after 120 days from the due date for manual tax filing).

Some of the key changes are as follows:

(a) The new Guidelines stipulate that taxpayers who file their tax return for a YA within the grace period provided under the respective years' Return Form Filing Programme are eligible for the compensation. An example has also been provided in the new Guidelines to demonstrate the methodology of computing the compensation amount in such cases. This was not outlined in the earlier guidelines.

(b) The criteria for taxpayers who are not eligible to be paid the compensation have been updated to include:

- Cases where assessments have been raised under Sections 90(3), 91, 91A, 92 and 96A of the ITA
- The taxpayer has requested for an extension of time for submission of tax return.
- The overpayment of taxes did not arise from instalment payments remitted pursuant to Sections 107, 107B and 107C of the ITA. An example has been provided to demonstrate this.
- There are taxes or additional taxes to be paid by the taxpayer due to audit findings, within 90 days from the due date for e-Filing or within 120 days from the due date for manual tax filing.

The earlier guidelines provided that taxpayers who do not have instalment payments under Sections 107, 107B and 107C of the ITA, or who fail to remit their instalment payments in accordance to the said Sections, are not eligible for the compensation. This is no longer stipulated in the new Guidelines.

(c) The earlier guidelines stipulated that in cases where the taxpayer's refund amount is less than RM100 (for companies) or RM50 (for individuals), an application for the refund will need to be lodged by the taxpayer within a stipulated timeline. Otherwise, the taxpayer will not be eligible for the compensation. This is no longer stipulated in the new Guidelines.

Public Ruling No. 1/2021 – Taxation of Unit Holders of Real Estate Investment Trusts / Property Trust Funds

The IRB has issued Public Ruling (PR) No. 1/2021: Taxation of Unit Holders of Real Estate Investment Trusts / Property Trust Funds, dated 25 May 2021. The PR explains the tax treatment of distribution of income from real estate investment trusts (REITs) / property trust funds (PTFs) in Malaysia to unit holders. This new eight-page PR replaces PR No. 9/2018, which was published on 12 October 2018 (see *Tax Alert No. 22/2018*). The new PR comprises the following sections and sets out four examples:

1.0 Objective
2.0 Relevant provisions of the law
3.0 Interpretation
4.0 Tax at unit holders' level
5.0 Filing of income tax return form
6.0 Updates and amendments
7.0 Disclaimer

The contents of the new PR are broadly similar to the earlier PR. Some of the key changes are as follows:

(a) The definition of "person" has been updated to stipulate that it includes a company, a body of persons, a limited liability partnership, a corporation sole and a partnership. In the earlier PR, the definition of "person" included a company, a co-operative society, a club, an association, a Hindu Joint Family, a trust, an estate under administration, an individual and a partnership.

(b) As outlined in the earlier PR, selected investors receiving profit distributions from REITs listed on Bursa Malaysia are taxed based on the following reduced withholding tax rates:

Type of investors	Withholding tax rate
Foreign institutional investors	10%
Non-corporate investors (including resident and non-resident individuals)	10%

The new PR has been updated to reflect the extension of the reduced withholding tax rate until YA 2025, as per Budget 2020.

Overseas developments

Indian Tax Tribunal applies beneficial treaty rate to dividend distributed during the dividend distribution tax regime

The Indian Tax Tribunal ruled on 30 April 2021 that tax on dividend income earned by a non-resident shareholder during the dividend distribution tax (DDT) regime must be limited to the applicable in-force tax treaty rate. The Tribunal ruled that dividend income was subject to tax in the hands of shareholders even during the DDT regime, as the imposition of tax was merely shifted to the company distributing the dividends for administrative convenience and therefore, the tax treaty rate takes precedence over the domestic DDT rate.

The Indian tax law was amended with effect from 1 April 2020 to abolish the DDT and introduce dividend taxation for shareholders receiving dividend income. This ruling could be relevant to taxpayers seeking tax refunds for DDT paid on dividends distributed by Indian companies prior to 1 April 2020.

The Tribunal ruling and implications for taxpayers are summarized below.

Detailed discussion

Background

Dividend taxation under the Indian domestic tax law has been subject to various amendments. Pre-1997, a classical system of the taxation of dividend income applied where dividends were taxed in the hands of shareholders and the companies paying the dividends were required to withhold tax on such dividend income. From 1997 to 2020 (apart from April 2002 to March 2003), the DDT regime was in force, under which the company paying the dividends was liable to pay DDT and such dividend income was exempt in the hands of shareholders. Recently, with effect from 1 April 2020, India abolished the DDT regime and the classical system of the taxation of dividend income was restored. The legislative intent of the adoption of the DDT regime stated that the classical system of taxation involved administrative inconvenience and the DDT provided an efficient single point of taxation.

Facts of the case

The taxpayer, an Indian company, distributed dividends to its non-resident shareholder (a Malaysian company) during the tax years 2012/13 and 2013/14. Under the India-Malaysia tax treaty, dividends paid by an Indian company to a Malaysian resident who is the beneficial owner of the dividends are subject to withholding tax of 5% in India. During its general tax appellate process, the taxpayer raised an additional ground for appeal to restrict the DDT rate (15% plus applicable surcharge and cess) to the 5% tax treaty rate prescribed under the India-Malaysia tax treaty.

Tribunal ruling

The Tribunal permitted the admission of the additional ground of appeal and ruled that the DDT rate must be restricted to the beneficial 5% rate prescribed under the India-Malaysia tax treaty. The reasoning behind the ruling is outlined below.

- Under the Indian domestic tax law, taxes need to be withheld at the "rates in force", i.e., rates under Indian domestic tax law or the applicable tax treaty, whichever is more beneficial to a non-resident taxpayer.
- Under the Indian domestic tax charging provisions, a dividend is chargeable as income of the shareholders; and the tax payment obligation is shifted to the company paying the dividends only for administrative convenience.
- If dividend income is taxable, the taxability has to be considered from the perspective of the recipient, not the payer of the dividend. This

principle is also approved by earlier rulings of the Indian Supreme Court.
- Under the DDT regime, while the tax on dividend income is borne by the payer, the DDT is only a mechanism through which tax is collected from the perspective of the recipient of the dividend income.
- Reliance was also placed on another Tribunal ruling, which ruled that the DDT rate must be restricted to the treaty rate, if the treaty rate is more favorable.

Implications

The Tax Tribunal ruling is of utmost relevance to multinational enterprises with Indian affiliate companies that have discharged DDT liabilities on past dividend distributions. Businesses should review the possibility of seeking refunds of excess DDT paid over the applicable tax treaty dividend withholding rates.

Philippines streamlines process for claiming tax treaty benefits

The Philippine Bureau of Internal Revenue (BIR) has issued Revenue Memorandum Order (RMO) No. 14-2021 (the Order) which provides updated guidelines for the processing of tax treaty relief applications (TTRAs) on all Philippine-sourced income derived by non-residents. The guidelines took effect immediately upon their issuance on 31 March 2021.

The key changes in the procedures and documents for claiming tax treaty relief are summarized below.

Summary of key changes

- The submission of a Certificate of Residence for Tax Treaty Relief (CORTT) Form for dividends, interest and royalties and the submission of a TTRA for all other types of income within 15 days before the first taxable event, are no longer required.
- Non-residents must submit a completed BIR Form No. 0901 or Application Form for Treaty Purposes and their Tax Residency Certificate (TRC) duly issued by the foreign tax authority to the withholding agent prior to the first payment of any type of income.
- The withholding agent, if applying the tax treaty rate, must file a request with the International Tax Affairs Division (ITAD) for confirmation of the tax treaty rate applied after the payment of the withholding tax, but not later than the last day of the fourth month following the close of each taxable year.
- If the withholding agent applied the regular (non-treaty) rates and the non-resident would like to get a refund of excess taxes withheld, the non-resident must file a TTRA with the ITAD at any time after the receipt of the income. After obtaining a certificate confirming entitlement to tax treaty benefits, the non-resident may claim a refund of excess tax withheld by filing a completed BIR Form No. 1913 (with its request letter) within two years from the date of payment of the withholding tax.
- For long-term contracts (effective for more than one year), an updated Application Form, a new TRC (if validity period has lapsed) and other relevant documents must be filed annually until the end of the contract to ensure the proper withholding tax rate is applied.
- The guidance also provides additional documentary requirements for foreign fiscally transparent entities (e.g., a list of owners or beneficiaries of the entity) and clarifies that members of a fiscally transparent entity must claim tax treaty benefits pursuant to the tax treaty between the Philippines and the member's state of residence.
- Taxpayers with pending TTRAs for income earned in 2020 and prior years, including those which received a Notice of Archiving, are given three months from the receipt of a "Final Notice to Submit Additional Documents" (Final Notice) or

from the effective date of the Order, whichever is later, to submit the missing documents. Taxpayers who were issued a Notice of Archiving will no longer receive a Final Notice. Failure to submit the requested documents would result in the automatic denial of the TTRA for failure of the non-resident to prove entitlement to the tax treaty benefits.

- Any violation of this Order, including failure to file a request for confirmation within the prescribed period, shall be subject to penalties.

Implications

Non-residents deriving Philippine-sourced income should discuss with their agent banks and/or tax advisors and review their compliance with the updated procedures and documentary requirements for claiming tax treaty benefits.

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Important dates

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
15 June 2021	Due date for monthly instalments
30 June 2021	6th month revision of tax estimates for companies with December year-end
30 June 2021	9th month revision of tax estimates for companies with September year-end
30 June 2021	Statutory deadline for filing of 2020 tax returns for companies with November year-end

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APAC no. 07002751
ED None.

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