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EY Tax Alert

Vol. 25 - Issue no. 14
20 July 2022

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Malaysian developments

Updates on withholding tax (WHT) on payments made to agents, dealers and distributors (ADDs)

Pursuant to the Finance Act 2021, effective from 1 January 2022 Section 107D was introduced into the Income Tax Act 1967 to provide that companies making payments in monetary form to ADDs arising from sales, transactions or schemes carried out, will be required to withhold tax at a rate of 2% on the gross amount (see *Tax Alerts No. 2/2022, 5/2022 and 7/2022*).

The Inland Revenue Board (IRB) issued a media release dated 9 July 2022 announcing the following administrative requirements:

- ▶ Companies making payments to ADDs are required to compute the total WHT applicable for a specific month (i.e., on a monthly basis) and remit the accumulated amount to the IRB by the end of the following month. For example, the WHT for payments made to ADDs in August 2022 (i.e., from 1 August 2022 to 31 August 2022) must be remitted to the IRB latest by 30 September 2022.

- ▶ Companies are required submit the latest [Form CP107D - Pin 2/2022](#) and [Appendix CP107D\(2\)](#) to the relevant IRB payment centres, by way of e-mail, before remitting the WHT. A copy of the e-mail must be presented to the payment centre for verification and checking purposes when the WHT payment is made.

The e-mail addresses of the respective payment centres are as outlined below:

- Kuala Lumpur payment centre: pbkl-cp107d@hasil.gov.my
- Kuching branch: pbkc-cp107d@hasil.gov.my
- Kota Kinabalu branch: pbkk-cp107d@hasil.gov.my

Malaysia Digital (MD) Status

On 4 July 2022, the Government launched the MD initiative, which will succeed Multimedia Super Corridor (MSC) Malaysia. This new initiative will drive digital transformations in focus areas that present high-growth potential, opportunities and importance. The Government, through the Malaysia Digital Economy Corporation (MDEC) will award the MD Status to eligible companies which participate in and undertake MD activities.

Under the MD initiative, it is noted that companies can operate and undertake approved activities in any location within Malaysia. Companies which used to be subjected to the minimum office requirement will no longer need to adhere to that requirement.

In line with the above, MDEC has published on its website the Guidelines on MD Status dated 30 June 2022 to provide an overview of the MD Status, including the eligibility criteria, conditions, the available benefits and incentives, as well as post-

approval considerations. The 12-page Guidelines comprise the following paragraphs:

- 1.0 Introduction
- 2.0 Eligibility criteria
- 3.0 Conditions of MD Status
- 4.0 Other general conditions
- 5.0 Benefits to MD Status companies
- 6.0 Sustainable development goals
- 7.0 MD Status application process
- 8.0 Post-approval application
- 9.0 Reporting and monitoring
- 10.0 Revocation of status
- 11.0 Surrender of status
- 12.0 Enquiries and support
- 13.0 Effective date

Some of the salient points are outlined below.

- ▶ To qualify for the MD Status, a company must be:
 - Incorporated under the Companies Act 2016 and tax resident in Malaysia,
 - Either proposing to carry out or is currently carrying out one or more MD activities (as outlined in the Appendix to this Alert)
- ▶ A company that has been awarded the MD Status must comply with the following conditions within 12 months from the date of award of the MD Status:
 - Commence operations and undertake MD approved activities in Malaysia
 - Employ at least two full-time employees (comprising knowledge workers) with a minimum average monthly base salary of RM5,000 for MD approved activities
 - Incur an annual operating expenditure of at least RM50,000 to carry on MD approved activities
 - Has paid-up capital of at least RM1,000

- ▶ MD Status companies will be eligible for and/or may apply for certain incentives, as well as certain rights and privileges from the Government as provided under the [MD Bill of Guarantees \(BoGs\)](#), subject to approvals and conditions. These include:
 - Tax incentives (i.e., income tax exemption or investment tax allowance)
 - Import duty and sales tax exemptions for multimedia or information and communication technologies (ICT) equipment
 - Foreign knowledge workers quota and passes
 - Freedom of ownership by exempting local ownership requirements
 - Flexibility to source capital and funds globally
- ▶ Applications for MD Status are to be submitted via [MDEC's website](#), which also outlines the step-by-step process for the said applications. Applications are subject to a non-refundable processing fee.

Each application will be assessed by MDEC and thereafter presented to an approval committee comprising representatives from the Government (i.e., approval committee) for deliberation, consideration and decision.

- ▶ The MD Status is perpetual, subject to continued compliance with the necessary conditions.
- ▶ An MD Status company may apply to add-on new MD activities under its MD Status. The process and criteria are similar to a company submitting a new MD Status application.
- ▶ An MD Status company is required to notify MDEC of the following:
 - Change in paid-up capital (which must be higher than the minimum condition), equity or shareholding structure of the company
 - Change in the name of the company
 - Change in the name of product or services (including re-branding) stated under the MD approved activities in the approval letter

- Change in the business operating address, contact person(s) and/or contact details

Any other variation to the conditions specified in the approval letter, apart from the above, will require the approval of the approving committee.

- ▶ An MD Status company is required to submit, on an annual basis, all true, correct and complete information and/or documents as requested by MDEC, for the purpose of reporting the progress of the MD approved activities and/or determining compliance with the application conditions.

All information submitted by the MD Status company must be verified by an independent external auditor appointed by the MD Status company at its own cost, or in any other manner specified by MDEC.

- ▶ A company's MD Status may be revoked in the event of non-compliance with the stipulated conditions. In such cases, the incentives and benefits granted will be withdrawn. The effective date of the revocation shall be determined by the approval committee.
- ▶ A company may also surrender its MD Status, subject to MDEC's assessment that the company has not failed to comply with any conditions imposed in relation to the MD Status. The surrender of the MD Status shall take effect from the date the surrender request is approved by the approval committee.

Overseas developments

OECD releases the Progress Report on Amount A of Pillar One of the BEPS 2.0 project and invites public comment

On 11 July 2022, the Organisation for Economic Co-operation and Development (OECD) Secretariat

released a *Progress Report on Amount A of Pillar One* (the [Progress Report](#)) in connection with the ongoing OECD/G20 project on *Addressing the Tax Challenges Arising from the Digitalisation of the Economy* (the so-called BEPS 2.0 project). The Progress Report is a consultation document released by the OECD Secretariat that covers many of the building blocks with respect to the new taxing right under Amount A and is presented in the form of domestic model rules. As noted in the Progress Report, it does not yet include the rules on the administration of the new taxing right, including the tax certainty-related provisions.

Together with the Progress Report, the OECD released a [Cover Note](#) by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) to the Progress Report providing a revised schedule for the work on Amount A as approved by the Inclusive Framework on 1 July 2022. The OECD also released a [Frequently Asked Questions](#) document on Amount A and a [Fact Sheet](#) providing an overview of the structure of the Amount A rules. In addition, the [OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors](#) (G20 Tax Report) for their 15-16 July 2022 meeting was released at the same time.

The documents make clear that the Amount A rules will not come into force in 2023 as had been reflected in the timeline agreed by the Inclusive Framework in October 2021 because there is additional work to be done. The Inclusive Framework is seeking written comments from stakeholders on the overall design of the Amount A rules reflected in the Progress Report by 19 August 2022, with plans to review the input received and stabilise the rules at the October Inclusive Framework meeting. When the Amount A rules are stabilised, they will be translated into provisions for inclusion in a Multilateral Convention (MLC), to be signed and ratified by Inclusive Framework members. The agreed schedule reflects the expectation that this work will be completed so that a signing ceremony for the MLC can be held in the first half of 2023, with the objective of enabling it

to enter into force in 2024 once a critical mass of jurisdictions has ratified it.

Detailed discussion

Background

Work on the BEPS 2.0 project began in early 2019. On 8 October 2021, the OECD published a [Statement](#) on the final political agreement on the key parameters of the two pillars of the BEPS 2.0 project, including an implementation timeline contemplating implementation of the new rules largely with effect from 2023.

Highlights

Several key documents with respect to the BEPS 2.0 project were released by the OECD on 11 July 2022:

- ▶ The Progress Report on Amount A of Pillar One, in the form of a public consultation document prepared by the OECD Secretariat covering many of the building blocks with respect to the computation of Amount A
- ▶ A Cover Note to the Progress Report providing a revised schedule for completion of work on Amount A, as approved by the Inclusive Framework on 1 July 2022
- ▶ A Fact Sheet providing an overview of the structure of the Amount A rules reflected in the Progress Report
- ▶ A Frequently Asked Questions document on the Progress Report
- ▶ The G20 Tax Report from the OECD Secretary-General, providing an update on the BEPS 2.0 project and other ongoing tax work

According to the Cover Note, the development of the Two-Pillar Solution is well advanced at this point, now nine months after the October 2021 political agreement. With respect to Pillar Two, the GloBE Model Rules were released in December 2021 and the related Commentary was published in March 2022. In addition, work on the Implementation Framework for

Pillar Two is underway and work on the design of the Subject to Tax Rule is ongoing.

On Pillar One, the Cover Note indicates that even though substantial progress has been made on the development of Amount A, the Inclusive Framework believes that further deliberation is merited with respect to a few of the building blocks. The Inclusive Framework has also decided to seek feedback from stakeholders on the design of the Amount A rules. The Cover Note indicates that the substance of the Amount A rules must be fully stabilised before proceeding to the development of the MLC, which will establish the legal obligations of the signatory parties to implement Amount A in a coordinated and consistent manner. In addition, the Cover Note specifies that the MLC will enter into force only upon ratification by a critical mass of countries, which will include the residence jurisdictions of the ultimate parent entities of a substantial majority of the companies that are in scope of Amount A as well as key additional jurisdictions that will be allocated the obligation to eliminate double taxation with respect to Amount A.

The Cover Note further provides that the Inclusive Framework has agreed to revise the schedule for the completion of the work on Amount A. Stakeholder feedback received on the Progress Report will be reviewed by the Inclusive Framework at its October 2022 meeting, and it will seek to stabilize the Amount A rules at that meeting. The work on the MLC and its Explanatory Commentary is expected to be completed so that a signing ceremony can be held in the first half of 2023, with the objective of enabling it to enter into force in 2024 once a critical mass of jurisdictions as defined in the MLC has ratified it.

In addition to the operative provisions of Amount A, the MLC will also contain provisions requiring the withdrawal of all existing Digital Services Taxes (DSTs) and relevant similar measures with respect to all companies, as well as a commitment not to enter into such measures in the future. The October 2021 Statement also included the agreement of Inclusive

Framework members that no newly enacted DSTs or other relevant similar measures are to be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The Cover Note does not reflect any specific update to this commitment in light of the new timeline for entry into force of the Amount A rules.

To reflect the technical work completed on Amount A thus far, the OECD Secretariat released the Progress Report on Amount A for public consultation requesting input on the design of the rules. The Progress Report includes a consolidated version of the operative provisions on Amount A, which was prepared by the OECD Secretariat and does not represent the consensus views of the Inclusive Framework. The document is framed in the form of domestic law provisions and is organized in seven Titles and ten Schedules (reflected in summary form in the Fact Sheet):

- ▶ Title 1: Scope
- ▶ Title 2: Charge to tax
- ▶ Title 3: Nexus and revenue sourcing rules
- ▶ Title 4: Determination and allocation of taxable profit
- ▶ Title 5: Elimination of double taxation with respect to Amount A
- ▶ Title 6: Administration
- ▶ Title 7: Definitions
- ▶ Schedule A: Supplementary provisions for scope
- ▶ Schedule B: Exclusion of Revenues and profits of a Qualifying Extractives Group
- ▶ Schedule C: Exclusion of Revenues and profits from Regulated Financial Services
- ▶ Schedule D: Covered Segment
- ▶ Schedule E: Detailed revenue sourcing rules
- ▶ Schedule F: Asset Fair Value or Impairment Adjustments
- ▶ Schedule G: Acquired Equity Basis Adjustments
- ▶ Schedule H: Transferred Losses
- ▶ Schedule I: Elimination tax base
- ▶ Schedule J: Elimination of double taxation - Return on Depreciation and Payroll

The Progress Report does not yet include the rules on the administration of the new taxing right, including the tax certainty-related provisions, which are to be released in due course and before the Inclusive Framework meeting in October 2022. Stakeholders are invited to submit written comments on any aspect of the Amount A rules in the Progress Report no later than 19 August 2022.

The Progress Report was also included as an annex to the G20 Tax Report prepared for the G20 Finance Ministers meeting in Bali, Indonesia on 15-16 July 2022. The G20 Tax Report provides a summary of developments in the BEPS 2.0 project, together with an update on other G20 tax deliverables including the new Inclusive Forum on Carbon Mitigation Approaches and the ongoing work of the Global Forum on Transparency and Exchange of Information for Tax Purposes.

Next steps

The public consultation on the Progress Report will be open for stakeholder input until 19 August 2022 and all written comments received will be made publicly available. Following this, the Inclusive Framework will meet in October 2022 with the aim of stabilising the rules. A signing ceremony of the MLC for the implementation of Amount A is expected to be held in 2023 with the objective of enabling it to enter into force in 2024. In addition to Amount A, work on Amount B is also expected to be delivered by year-end.

Implications

These documents provide significant new information with respect to the design of Pillar One Amount A and reflect a new timeline for its planned implementation. Affected companies should review the documents carefully and may want to consider taking the opportunity to engage with the OECD and country policymakers through the consultation process. It also will be important to continue to monitor

developments with respect to both Pillar One and Pillar Two closely over the coming months.

Poland proposes significant changes to its Corporate Income Tax law

On 28 June 2022, the Polish Government announced draft legislation implementing changes to the Polish Corporate Income Tax law. The proposed changes affect several areas of taxation, however, most of them are related to areas which were covered by the latest reform implemented as of 1 January 2022.

The potential impact of the proposed changes, including the areas where the 1 January 2022 tax reform has not yet become effective, should be assessed by businesses in order to prepare for change and undertake the necessary actions.

Detailed discussion

The draft legislation impacts the following areas:

- ▶ Tax deductibility limitations regarding so-called “hidden dividends” that were supposed to be in force as of 1 January 2023 will not be implemented
- ▶ The effective date of the new “minimum tax” is postponed to 1 January 2023 (or until the end of a taxpayer’s tax year that started during 2022) and there are changes in its specific provisions, including:
 - The minimum profitability ratio providing for an escape clause from the minimum tax is increased from 1% to 2%
 - Several new types of payments are excluded for the purpose of the profitability ratio calculation (e.g., fixed assets lease payments, revenues and costs related to sale of receivables under factoring arrangements, revenues and costs corresponding to excise duty and year-to-year increase in payroll cost and in costs of electric energy purchased for business purposes)

- An option is now proposed to choose between two alternative formulas to calculate the minimum tax basis (in both cases the tax rate is 10%), i.e., 4% of revenues (other than capital gains) or 2% of revenues (other than capital gains) increased by certain types of payments (several changes compared to the catalogue of payments and to the methodology of their calculation implemented under the 1 January 2022 reform)
- Exemptions are allowed for new types of entities, e.g., small taxpayers (less than €2m gross revenue in a preceding year), entities that generate majority of revenue from regulated medical services or taxpayers whose profitability in at least one of previous three tax years exceeded 2%
- ▶ Changes to the “shifted profits tax” which was introduced as of 1 January 2022 with the first due date linked with the annual Corporate Income Tax (CIT) settlement (typically the end of the third month of the following tax year). The changes are predominantly aimed at clarifying conditions which trigger application of the 19% shifted profits tax. However, some amendments are also proposed, like an additional condition that at least 10% of shifted profits paid by the Polish entity must be subsequently transferred by the foreign recipient to another entity, for the shifted profits tax to apply
- ▶ Changes to the withholding tax (WHT) pay-and-refund regime, by extending the validity of a management board statement until the end of a given tax year (currently up to three months)
- ▶ Changes to the WHT regime regarding e.g., lifting of the obligation to remit WHT in certain situations, e.g., in the case of securities issued by the Polish State Treasury, bonds issued by some Polish State entities, covered bonds and bonds admitted to trading on a regulated market (or in an alternative trading system) that are held by foreign tax residents
- ▶ Amendments with respect to limitations of debt financing costs:
 - Explicit indication that the higher of PLN3m or 30% of tax EBITDA (earnings before interest, taxes, depreciation and amortization) should be applied as a maximum threshold
 - New exceptions from the non-deductibility of related party financing costs related to so called “capital transactions,” for example for the acquisitions of shares of unrelated entities or debt financing granted by banks seated in the European Union or the European Economic Area
- ▶ Broader scope of CIT exemption for interest or discount and capital gains earned by non-residents investing in Polish securities issued by the State Treasury (currently the exemption applies only to securities issued in foreign markets, which narrows down the scope of this exemption)
- ▶ Changes in the “Polish holding company regime” which include an increase in the exemption for dividends received from qualified subsidiaries to 100% (from 95%) and the easing of some of the conditions required to benefit from the regime
- ▶ Amendments in regulations regarding Transfer Pricing (TP) documentation for transactions (also indirect) with tax havens, including an increase of minimum thresholds triggering certain documentation obligations
- ▶ Limitation of reporting obligations regarding certain transactions with non-residents, which are already subject to TP reporting
- ▶ Clarification of the rules regarding the use of tax losses by Tax Capital Groups (tax grouping system in Poland)
- ▶ Simplification of rules regarding the refund of the minimum levy (tax on certain leased properties)
- ▶ Amendments to the Controlled Foreign Company (CFC) regime
- ▶ Changes in the rules regarding the lump-sum taxation regime

The majority of the changes proposed in the draft legislation are to come into force as of 1 January 2023. However, there are certain exceptions including cases where new provisions are planned to

be effective retrospectively (e.g., from the beginning of 2022).

Next steps

The proposed legislation impacts a broad range of tax areas. This Alert provides a general overview of certain selected issues under the new proposed provisions.

List of MD Activities

Research, development and commercialisation of solutions and/or the provision of services in relation to any of the following technologies or areas:

1. Big data analytics
2. Artificial intelligence
3. Financial technology
4. Internet of things
5. Cybersecurity (technology / software / design and support)
6. Data centre and cloud
7. Blockchain
8. Creative media technology
9. Sharing economy platform
10. User interface and user experience
11. Integrated circuit design and embedded software
12. 3D printing (technology / software / design and support)
13. Robotics (technology / software / design)
14. Autonomous technologies
15. Systems / network architecture design and support
16. Global business services or knowledge process outsourcing
17. Virtual, augmented and/or extended reality
18. Drone technology
19. Advance telecommunication technology
20. Other emerging technologies deemed significant for the digital ecosystem subject to approval by the approval committee

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Important dates

31 July 2022	6 th month revision of tax estimates for companies with January year-end
31 July 2022	9 th month revision of tax estimates for companies with October year-end
31 July 2022	Special 11 th month revision of tax estimates for YA 2022, for companies with August 2022 year-end
31 July 2022	Statutory deadline for filing of 2021 tax returns for companies with December year-end. A blanket extension of time has been provided until 31 August 2022.
31 July 2022	Extended 2021 tax return filing deadline for companies with November year-end.
15 August 2022	Due date for monthly instalments
31 August 2022	6 th month revision of tax estimates for companies with February year-end
31 August 2022	9 th month revision of tax estimates for companies with November year-end
31 August 2022	Special 11 th month revision of tax estimates for YA 2022, for companies with September 2022 year-end
31 August 2022	Statutory deadline for filing of 2022 tax returns for companies with January year-end. A blanket extension of time has been provided until 30 September 2022.
31 August 2022	Extended 2021 tax return filing deadline for companies with December year-end.

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APAC no. 07009063
ED None.

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