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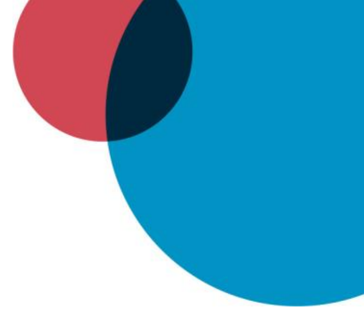


Singapore Variable Capital Company

Your global tax partner

1. **BACKGROUND**

On 1 October 2018, the Variable Capital Companies Bill was moved for its second reading in the Singapore Parliament and was passed into law. The long awaited implementation of the Singapore Variable Capital Company (also known as the "VCC") is now almost complete. The introduction of the VCC is intended to further enhance Singapore's appeal as an international fund management hub. It expands Singapore's existing toolbox of domestic vehicles and brings it into closer alignment with competitor jurisdictions such as Hong Kong, Luxembourg, Ireland and traditional offshore jurisdictions.

Singapore continues to gain prominence as global funds centre. According to a survey conducted by the Monetary Authority of Singapore ("MAS") in 2016, Singapore had reached S$2.7 trillion of assets under management ("AUM"). This amount grew to S$3.3 trillion by the end of 2017. Approximately 70% of the AUM is invested into the Asia-Pacific Region which demonstrates the position of Singapore as a hub for the deployment of regional capital. It is anticipated that the introduction of the VCC will help these positive growth trends to continue.

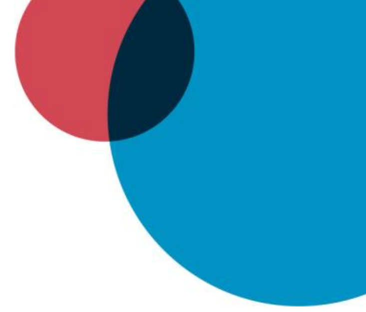
2. **THE CONCEPTUAL PREMISE OF THE VCC**

The VCC is an entirely new statutory regime and is not a mere adaptation of existing Singapore corporate law. A VCC is essentially a corporate vehicle with two main defining features. The first is the ability to establish segregated cells, while the second is the concept of variable capital.

A. Separate cells

Cell companies are not a new innovation in the financial services space. Offshore jurisdictions have led the development of cellular companies which now exist with subtle variations between jurisdictions and statutory regimes. Cell companies continue to be used as reinsurance or captive insurance vehicles, and commonly form part of both open and closed-ended fund structures. As the name suggests, a cell is a notional segregation of assets and liabilities which is typically made within the same entity. This segregation is established by way of statutory provisions which protect against liabilities crystallising in one cell from being recoverable against the assets held in a different cell. This internal ring fence is intended as an alternative to establishing separate asset or strategy specific special purpose vehicles which can become an unwieldly proposition. A flow on benefit from this internal segregation is the ability to compute the profit and loss or balance sheet position of a cellular company on a cell by cell basis. This means if a cell represents a particular investment strategy, then investors in that cell do not need to be concerned about the performance of other cells.

While cell companies are well known within the financial services industry, what is less clear is the robustness of this internal segregation from a foreign law perspective. There are potentially complicated conflict of laws questions which may arise if a judgement is awarded in a particular country against a cell company and the courts of that foreign jurisdiction enable recovery in bankruptcy against assets kept in other cells. It remains to be seen how permeable or not the legal ring fence will be when it comes under serious scrutiny.



B. Variable capital

The other defining feature of the VCC is the concept of variable capital. Under existing Singapore corporate law, it is only possible to pay a dividend out of the profits of a company limited by shares. The concept of profits is not specifically defined within the Singapore Companies Act6 ("CA") itself. The generally accepted position is that 'profits' can be interpreted by the directors of a company to mean the accumulated retained earnings of a company or the current year profits. In practice most boards will pay careful regard to the existence or not of profits which are recorded in the financial statements of a company. If a dividend is paid when there are no profits available, this would constitute an offence under the CA.

A reduction in capital must be carried out in a manner authorised by the CA. Even at its simplest, this includes procedures for the notification of creditors and the making of solvency declarations by directors. Under the CA, a company may generally only repurchase 20% of its shares during any period up to the next annual general meeting unless it follows a capital reduction procedure.

Where a Singapore company is used within a funds structure, the current workaround for close-ended funds has been to establish the capital structure of that company with a combination of more flexible instruments. This may include interest free debt and redeemable preference shares ("**RPS**"). RPS are used as they are easier to redeem in practice than undertaking a non-court ordered return of capital. These structuring tools can however be cumbersome in practice and one has to be careful about the debt / equity characterisation of RPS. Open-ended funds wishing to use an entirely Singapore structure have to rely upon either a limited partnership or a unit trust to facilitate investor redemptions.

The concept of variable capital is given affect within the VCC Act by certain provisions which are to be implied in the constitution of all VCCs. The value of the paid-up capital of a VCC is at all times deemed to be equal to the net asset value of the VCC. This effectively folds the retained earnings or accumulated losses of a VCC directly into the share capital. Property of the VCC must be measured on a fair value basis so the net asset value of a VCC should be reflective of its fair market value. The frequency of this rebalancing is not specified in the VCC Act but presumably for open-ended funds this will align with investor redemption windows. Shares of a VCC are able to be redeemed or repurchased at a price equal to the portion of the net asset value of the VCC, subject to certain adjustments which are necessary for the costs associated with these redemptions.

None of the formality or CA restrictions that would otherwise apply for a company limited by shares apply. It is noted by the MAS in an early consultation document that the requirement to repurchase or redeem at NAV provides some degree of creditor protection. This is clearly less onerous than requiring the board to pass solvency statements every time shares in a VCC are to be redeemed.

3. KEY FEATURES

The key features of the VCC may be summarised as follows:

(a) A VCC must be a collective investment scheme as this term is defined within the Singapore Securities and Futures Act ("**SFA**"). An earlier proposal to require a minimum of two investors in a VCC was scrapped by the MAS in response to industry feedback. The MAS describe a VCC with

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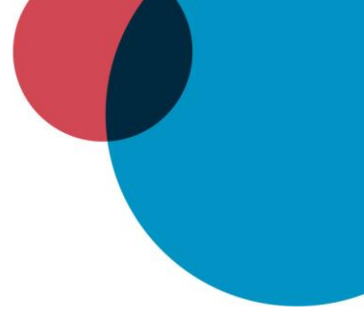


multiple cells as an 'umbrella VCC'. They have confirmed that it is possible for an umbrella VCC to consist of both open-ended and closed-end funds as its sub-funds.

(b) A VCC must appoint a fund manager which is licensed under the SFA. Certain exempt fund managers, including registered fund management companies, may also manage a VCC. Single family offices, immovable assets managers and related corporations are excluded from the class of permissible exempt fund managers. The MAS specifically note that they may expand the list of permissible exempt fund managers in the future.

(c) Investors can directly invest into the VCC as members and hold shares that are transferable and redeemable. It can be expected that a transfer of the shares in a VCC will be subject to Singapore stamp duty in the typical manner.

(d) VCCs are required to appoint an auditor to audit their accounts on an annual basis. Each sub-fund will be required to prepare separate financial statements, which must be audited and prepared in accordance with a single accounting standard across all sub-funds. There is no need for a VCC to have an audit committee.

(e) A VCC constituting an Authorised Scheme[13] or Restricted Scheme[14] under the SFA will be required to appoint a custodian, subject to various conditions. The MAS specifically reference an exemption for VCCs which are used as private equity and venture capital fund vehicles. This aligns with the current position for such funds under the SFA.

(f) As noted above, a VCC can register and segregate its assets into different subfunds held within the same legal entity. A VCC can then use each sub-fund to invest and directly hold a portfolio of different investments.

(g) The VCC Act provides for several measures to mitigate against cross-cell contagion, so that liabilities against a sub-fund may be prevented from being claimed against another sub-fund.

(h) The register of members of a VCC does not need to be made public. It must however be provided upon request to certain persons. These include any public authority, the manager of the VCC and any appointed custodian.

(i) It is currently contemplated that the VCC may apply for certain tax incentives that are available in Singapore for investment funds. For example, the tax exemption for specified income arising from designated investments may be available if the investment fund meets the conditions and is successfully granted the Enhanced Tier Fund tax incentive under Section 13X of the ITA or the Singapore Resident Fund Scheme of Section 13R. Comments made in the 2018 Budget suggest that a VCC will be considered as a single entity for the purposes of these incentives.

(j) As noted above, a VCC will have variable capital which is fundamental in facilitating easier investment redemptions.

(k) Foreign corporate entities may also apply to be redomiciled into Singapore as a VCC. This concept is broadly consistent with redomicilation provisions which were introduced into the CA in early 2017. The VCC Act does not contemplate the conversion of existing Singapore fund vehicles such as a unit trust or company to a VCC[18] nor is there any concept of amalgamation.

4. TAX CONSIDERATIONS

The local asset management industry is cautiously optimistic about the introduction of the VCC. Industry experts have noted that the success of the VCC regime may hinge on whether VCCs can enjoy Singapore's tax incentives and obtain access to Singapore's network of tax treaties.

Tax treaty access is a question which is comprised of two parts. The first and simplest part is whether the Inland Revenue Authority of Singapore (**'IRAS'**) will issue a certificate of residency for a VCC. The second is whether a VCC is somehow more easily able to claim treaty benefits from a source jurisdiction perspective.

A. Singapore position

In their detailed response to industry feedback, the MAS acknowledged feedback from the public which, amongst other things, called for VCCs to be able to benefit from Singapore's tax treaty network. VCCs should be entitled to obtain Certificates of Residency if they are Singapore tax resident as this concept is generally applied.

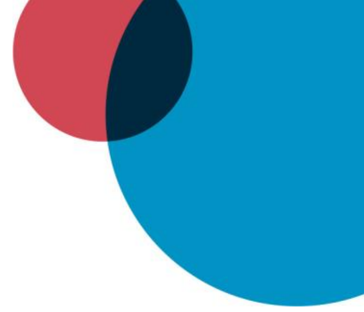
A company or a body of persons is considered to be resident in Singapore if the control and management of its business is in Singapore. It is well established that this is a question of where the directors of the company come together to make substantive business decisions. This is overlaid in a practical sense by more prescriptive substance requirements which are set out by the IRAS on their website. It is necessary to go beyond merely having board resolutions in Singapore for a foreignowned investment holding company. Given the way that the Singapore tax system is shaped, residency is more of a benefit than a burden which explains the somewhat restrictive approach.

For companies which are established as investment funds this test is typically satisfied by examining the economic substance of the fund manager. The substance that is required by a local manager to satisfy their licensing obligations under the SFA go long way to establishing the necessary substance in this tax context. This includes the minimum requirement for two fit and proper persons having at least 5 years of relevant experience to be appointed as the representatives of the fund management company to the MAS.

Interestingly the VCC Act indicates that VCC are now taken to be bodies corporate and not companies. This makes no difference in the context of asserting tax residency for Singapore purposes. The ITA definition specifically refers to bodies of persons which is defined to include bodies corporate. However as noted below, additional conforming changes will be needed to other provisions of the ITA if it is indeed intended for the tax position of a VCC to be on all fours with a Singapore company.

B. Source country considerations

Even with a Singapore certificate of residency in hand, the ability of a VCC to obtain treaty benefits will in practice depend upon the position taken by source countries. In this respect, a VCC should generally be in a better position than a Singapore company which may be established as a sub-fund of an orthodox Cayman LP master fund structure.



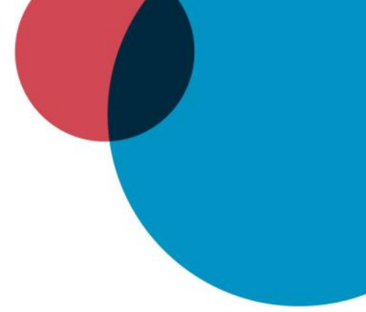
The ability of investment funds to access treaty benefits is specifically discussed by the Organisation for Economic Cooperation and Development ("**OECD**") as part of BEPS Action Plan 6 on "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" ("**BEPS 6**"). This follows on from earlier analysis undertaken by the OECD which attempts to articulate circumstances where it is appropriate that an investment fund be entitled to treaty benefits (the "**2010 CIV Report**").

The OECD draw a distinction between funds that are "collective investment vehicles" ("**CIVs**") compared to non-CIVs. For this purpose, CIVs are defined to be limited to "*funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established.*" In their earlier report, the OECD discuss whether a CIV may in principle be granted access to tax treaty benefits. These general principles have been adopted in the Commentary on Article 1 of the OECD Model Tax Convention. Where a treaty does not include a specific provision dealing with CIVs, a CIV would have to qualify as a "person" that is a "resident" of a contracting state and is the "beneficial owner" of the income that it receives. The inherent substance required to establish a VCC – both on the manager side and within the entity itself – is helpful from this perspective.

Another key factor is the ability of the VCC to act as both a pooling vehicle and the vehicle through which capital is directly deployed. This is helpful in applying the concept of beneficial ownership which is now generally understood as including circumstances where funds are on-paid as a matter of fact to the owners of an entity. This is an emerging basis on which a source country may seek to deny treaty benefits to a sub-fund established under an orthodox fund structure. It is clearly inherent in these structures that cash will be upstreamed to investors. It is increasingly desirable for funds to pool in the same jurisdiction in which a sub-fund may be established. In a Singapore structure this may be achieved by the combination of a Singapore LP that is the parent of a Singapore corporate sub-fund. With the introduction of the VCC, it is possible to collapse this into the same entity and achieve the cellular segregation of assets and liabilities at the same time.

The initial draft of the VCC Bill stated it was necessary for a VCC to be held by two investors. In response to industry feedback this requirement was dropped. What this means is that potentially Master and Feeder structures can be assembled which are entirely comprised of VCCs. The circumstances where this may be relevant are not difficult to contemplate. It is common for US tax-exempt and non-US investors to invest into a fund through a "blocker" which is not transparent for US tax purposes. This is the well-established work-around to the risk of unrelated business income taxes which faces US tax-exempt investors. Taxable US investors will generally wish for a fund to be entirely tax transparent assuming that it does not have effectively connected income. Some larger institutional investors will want to use their own feeder SPV irrespective of whether the US tax position is relevant to them.

Potentially a vertical stack of VCCs can be used to collapse down the somewhat elaborate fund structures which have evolved to cater to these needs of different investor profiles. A feeder VCC could proportionally invest into a master VCC into which other investors directly pool. This feeder could have one or more cells, which would depend upon investor preferences. Additional cells could be used to act as dedicated feeders for large institutional investors if they so desire, or to accommodate the ability of certain cornerstone investors to opt into or out of deals. This structure would potentially work all the better if check the box elections may be made on a cellby-cell rather than entity basis as discussed below.



C. Principal purpose test

The clear and tangible commercial benefits associated with using a VCC potentially make this vehicle less susceptible to attack by a source country on the basis of the principal purpose test ("**PPT**").

The PPT is a general anti-avoidance provision against treaty abuse. It is now read into tax treaties as part of the multi-lateral amending instrument as a minimum standard. Optionally two jurisdictions that are parties to a covered tax agreement may choose for a simplified or enhanced limitation of benefits article to apply. Singapore is party to the multi-lateral amending instrument and has selected the PPT which means that this is the applicable treaty abuse mechanism as far as Singapore's double tax agreements are concerned. Notwithstanding that it exists as a minimum standard, the PPT is still potentially onerous. It can apply if *one* of the principal purposes of a transaction or arrangement is to obtain treaty benefits, these benefits would be denied unless it is established that granting these benefits would be in accordance with the object and purpose of the provisions of the treaty.

Depending upon the precise circumstances, the VCC may be one of a number of compelling reasons why Singapore is chosen as a fund domicile jurisdiction by a manager. Other reasons include the local regulatory environment which is a carefully calibrated balance between investor protection and the machinations of the free market; immediate access to the local financial ecosystem which is well established and has developed to service the Asia Pacific region; the ability to have recourse to the local Singapore courts or other forms of dispute resolution such as the International Commercial Court or Singapore situs arbitration. Even softer factors come into play such as the lifestyle in Singapore, which is an attractive place for investment professionals to relocate.

5. OTHER OBSERVATIONS

A. VCCs are not companies

A subtle but significant change was made during the development of the VCC legislation. It is specified that a VCC is a body corporate which by implication means that it is not considered to be a company under Singapore law.

This distinction makes no difference from a Singapore tax residency perspective for the reasons set out above. However, there are some provisions with the ITA which specifically reference a company and do not include the additional concept of a 'body of persons' which includes bodies corporate. For example, dividends which are paid by a *company* resident in Singapore are exempt from Singapore tax under Section 13(1)(za) of the ITA. Potentially a separate exemption along the lines of that applying to distributions made by registered business trusts will be needed to align the position with Singapore companies. A similar consideration emerges in the context of the participation-exemption style safe-harbour of Section 13Z of the ITA. This only applies where a divesting *company* disposes of ordinary shares in an investee company where it has held at least 20% for a period of at least 24 months ending on the day prior to disposal.

Once again conforming changes will be needed to the ITA if it is intended that a VCC will be able to benefit from this safe-harbour. No such amendments are required to the exemption applying for taxed foreign sourced dividends of Section 13(8) of the ITA. This is already drafted as applying to a person resident in Singapore.

B. VCCs and carry structuring

Implementing an optimised carry structure is an important part of fund formation. These structures must be analysed from the perspective of the residence jurisdiction of the investment professionals who may be entitled to enhanced returns. It is typically the case that a carry structure is integrated into the master pooling vehicle and a degree of discretion is intended in relation to these arrangements. This is particularly true in relation to the carving out of carry entitlements between the various investment professionals and in what proportions. Carry often flows through the general partner of a limited partnership, or a special limited partner – whichever sponsor controlled entity contributes the required co-invest.

It will be interesting to see what orthodox carry planning will look like where a VCC is used as a master pooling vehicle. Without a general partner, one option will be to flow the carry entitlement through the Singapore fund management company. The obvious problem with this is the loss of capital gains treatment for US persons if this is paid by a VCC as a service fee to the Singapore fund manager. Other options involve the use of a special purpose vehicle. This could either proportionately seed each cell with the sponsor co-invest and receive distributions in the form of preferred return. Or this function may be separately performed by a separately established carry cell that is wholly owned by an offshore carry vehicle.

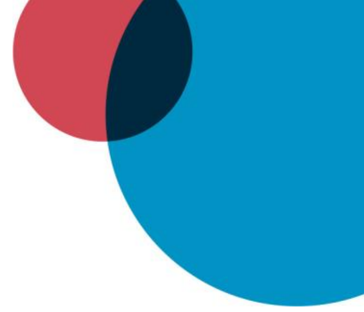
C. Potential recharacterisation of investment returns

The innovation of variable capital means that in practice a large portion – if not all – of investor returns will come in the form of the proceeds from the redemption of membership interests in a VCC. This is fundamentally different from the tax character of investment returns which are paid by a fund established as a Singapore company. Typically these returns are paid in the form of dividends where there are sufficient profits, with excessive cash paid in the form of repayments of interest-free debt or the redemption of RPS.

Different tax consequences flow from the receipt of different types of income or gains. To take a simple example, there is a clear difference for a Singapore institutional investor. Dividends from a fund established as a Singapore company are exempt from tax. This conclusion holds irrespective of whether these returns are received directly or via an interposed foreign limited partnership. Capital gains are not taxed in Singapore but the distinction between assets held on revenue and capital account is stringently applied by the IRAS. For a Singapore corporate investor into a VCC it is easy to see how they would have a preference for investment returns to come in the form of exempt dividends as opposed to a redemption or repurchase premium.

D. Characterisation of VCCs for CFC purposes

The development of cell companies has given rise to a number of questions about their characterisation from the perspective of foreign tax jurisdictions. Many jurisdictions which impose taxation on a residence basis have controlled foreign corporation ("**CFC**") rules which seek to attribute the income of controlled companies to resident persons. Subpart F of the US Internal Revenue Code is the best known example of a highly targeted and nuanced CFC regime. This is supported by the passive foreign investment company ("**PFIC**") rules which apply to attribute the income referral to non-controlling interests held in predominately foreign passive investment vehicles.



One of the recommendations coming from the OECD BEPs program has been the implementation of CFC regimes in those jurisdictions which do not already have these rules. Recent changes have been made to introduce or enhance these rules in many jurisdictions. Some examples from the Asia Pacific region include the refinement of the CFC rules of China and Indonesia. It is typically the case that the CFC rules will be triggered only if there is control which can be variously defined as amounting to control in fact or an interest of greater than 50% in the income, capital or voting rights of a foreign company. Much less common at the moment are the equivalent of PFIC rules which can apply in relation to foreign company which may not be controlled by persons who are resident in a particular jurisdiction.

The classification of cell companies for the purposes of a country's CFC regime is significant in the context of more closely held funds. Funds that may otherwise be placed with an asset manager as part of a managed account could be transferred into the cell of a foreign segregated portfolio company or perhaps even a VCC. If the fund manager has a sufficiently broad and jurisdictionally diverse mixture of investors, and if a country treats the cell company in question as a single entity for CFC purposes, then potentially these rules may not be engaged.

E. US check the box elections

The application of the US check the box rules are a potentially important part of the implementation of a VCC having prospective US investors. Consensus will need to emerge about whether these elections are to be made at an entity level or on a cellby- cell basis. The VCC will have the greatest level of flexibility, particularly as a consolidated feeder vehicle, if elections may be made in relation to individual cells.

6. CONCLUSION

The VCC regime has been under development for many years now. The development of this new vehicle has been careful and deliberate, and its introduction is a well-timed response to the prevailing international tax paradigm. Singapore is an established asset management hub and it is clearly complementary for Singapore to become a funds domicile jurisdiction as well. The potential to combine in-country fund management with the pooling of investors into the VCC itself is very helpful in enabling access to treaty benefits. A VCC is more likely to be regarded as a CIV in the parlance of the OECD and should suffer less resistance in seeking to access treaty benefits.

As the VCC regime goes live, it will also be interesting to see how it is received on an international level. It may take a while for international funds players to embrace this as an alternative to established Cayman LP based structures. There is always going to be a fundamental concern around investor familiarity. The potential downsides of presenting a new vehicle during a fund-raise are self-evident. It should not come as a surprise if the rate of uptake is initially a little slow. That said, the VCC is a very positive development and the high quality of Singapore's regulatory, financial services and dispute resolution infrastructure will be helpful in overcoming any initial barriers to adoption.