MALAYSIA

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

There are no recent developments in this aspect. For further information on Malaysia's compliance with BEPS initiative, please see the comments in question 2 below.

2 WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

Malaysia supports the BEPS initiative and is committed to review and update the local tax legislation to ensure that it is in line with the BEPS Actions. In March 2017, Malaysia joined the Inclusive Framework on BEPS as a BEPS Associate and is committed to the implementation of 4 minimum standards, i.e. countering harmful tax practices (BEPS Action 5), prevention of treaty abuse (BEPS Action 6), implementation of country-by-country (CbC) reporting (BEPS Action 13) and enhancing dispute resolution mechanisms (BEPS Action 14). In addition, in line with BEPS Action 4, Earnings Stripping Rules ("ESR") was introduced and would come into effect from 1 January 2019 onwards.

At present, the Ministry of Finance and the Malaysian Inland Revenue Board have not provided further details on the implementation of the four minimum standards, except for the implementation of Action 13. The rules with respect of the filing of CbC reports and the exchange of CbC reports with other jurisdictions were issued by the Ministry of Finance in December 2016. Various amendments were subsequently made to the rules with respect of the filing of CbC reports under the Income Tax (Country-by-Country Reporting) (Amendment) Rules 2017, which were gazetted on 19 December 2017. In addition, Malaysia is also one of the participating countries with respect to the development of a multilateral instrument (in accordance with BEPS Action 15) to expedite and streamline the implementation of the measures developed to address BEPS, through effecting amendments to bilateral tax treaties.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND AN ASSET DEAL IN YOUR COUNTRY?

In a share deal, where the acquiring company buys the shares in the target company, the target company continues to benefit from claiming capital allowance (tax depreciation) on qualifying assets and any unabsorbed tax losses or unabsorbed capital allowances can be carried forward to future years, subject to the "substantial change in shareholders" provision as explained below.

Where there is a substantial change (more than 50%) in the shareholders of a company, any unabsorbed tax losses or unabsorbed capital allowances cannot be carried forward to future years. However, this provision does not apply to active companies, based on a concession granted by the Minister of Finance.

If the target company has been granted tax incentives, the incentives can continue to be enjoyed by the target company unless there is an approval condition attached to changes in shareholders.

In an asset deal, where the acquiring company buys certain assets from the selling company, the selling company will be subject to a tax adjustment by way of a balancing allowance or a balancing charge where capital allowances have been claimed on the acquired asset. A balancing charge (taxable item) arises where the sales proceeds for the asset exceed its tax residual value. Conversely, a balance allowance (deductible item) arises where the sales proceeds is lower than the tax residual value. However, this provision does not apply in a "controlled transfer" where the seller has control over the acquirer or vice versa, or where the seller and the acquirer are controlled by another person. In a "controlled transfer", no balancing charge or balancing allowance will arise to the seller and the acquirer can continue to claim capital allowances on the transferred asset, subject to the tax residual value of the asset.

Gains arising from the sale of shares in a real property company or real property (for example, land and buildings) will be subject to real property gains tax. A "real property company" is defined as a controlled company that owns real property or shares in real property companies or both, whereby the market value of the real property or shares in real property companies or both is not less than 75% of the value of the company's total tangible assets. In this regard, a "controlled company" is a company having not more than 50 members and controlled by not more than five persons.

From a stamp duty perspective, the sale of shares in a Malaysian incorporated company will be subject to stamp duty at the rate of 0.3%. Sale of assets such as land and receivables will attract stamp duty at rates ranging from 1% to 3%. Nevertheless, relief from stamp duty is available for reconstructions or amalgamation of companies, or for transfer of property between associated companies, subject to fulfilling certain conditions.

As for goods and services tax (GST), a transfer of undertaking or asset is regarded as a taxable supply unless the conditions of a transfer as a going concern are met. The transfer of shares is exempt from GST. Note that effective from 1 June 2018, all taxable supplies have been zero-rated and the GST legislation is expected to be repealed shortly.

BUY-SIDE

4. WHAT STRATEGIES ARE IN PLACE, IF ANY, TO STEP UP THE VALUE OF THE TANGIBLE AND INTANGIBLE ASSETS IN CASE OF SHARE DEALS?

There are no provisions in the Malaysian Income Tax Act that provide a step-up in the value of the underlying assets in a share deal.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

Malaysia does not have any particular rules for amortization of goodwill. Goodwill is not tax deductible and does not qualify for capital allowances.

6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

Interest cost is deductible against gross business income if it relates to borrowings used for working capital or laid out on assets used or held for the production of gross income from the business. The deductibility of interest is subject to restriction if the loan on which the interest relates, was used directly or indirectly for non-trade purposes (e.g. investment in movable or immovable property or loans to others). The amount of interest restricted can be claimed against income from the investment, if any (e.g. rental or interest income).

Under the single tier system, dividends received by the shareholders are exempt from tax. In line with this, any expenses, including interest on borrowings to finance the share acquisition will be "lost" as such expenses are to be disregarded for tax purposes.

The thin capitalisation rule has been revoked and will be replaced by the Earning Stripping Rules ("ESR"), proposed to take effect from 1 January 2019. Under ESR, it has been proposed that the deduction for interest on loans between related companies within the same group will be limited to a ratio, ranging from 10% to 30%, of a company's Earnings Before Interest and Taxes ("EBIT") or Earnings Before Interest, Tax, Depreciation and Amortisation ("EBITDA"). At present, the ESR has not been legislated as yet and there are no guidelines issued by the tax authorities on the application of this rule with regard to the specific ratio and basis i.e. EBIT or EBITDA.

It should be noted that payment of interest to non-resident lenders is subject to withholding tax at the rate of 15% under the domestic tax legislation.

7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN DEBT ON ACQUISITIONS?

Where the acquiring company pushes down a debt that has been used to finance the acquisition of shares in a target company, the target company will not be allowed a deduction for interest on the borrowings obtained to repay part of its share capital. Also, since single tier dividends are tax exempt in the hands of the shareholder, the acquiring company will not enjoy a tax deduction on interest on borrowings to finance the share acquisition.

It would be more tax efficient if the undertaking, rather than the shares, of the target company is acquired by a local acquiring company. In this regard, the acquiring company would be entitled to claim a deduction for the interest on borrowings obtained to fund the acquisition of the undertaking.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

There is no specific tax incentive for equity financing.

9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

The unabsorbed tax losses of the target company brought forward from previous years will be available to offset against future business income of the target company. As a concession, companies (except dormant companies) are allowed to carry forward unabsorbed tax losses even when there is a substantial change (more than 50%) in the shareholders. The unabsorbed tax losses are not allowed to be transferred to the acquiring company.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

For corporate income tax purposes, the statute of limitation is 5 years whilst the statute of limitation for transfer pricing is 7 years. The acquiring company should review any tax incentives granted by the Malaysian government to the target company, particularly on the qualifying conditions and tax incentive period.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

Malaysia imposes stamp duty on chargeable instruments executed on certain transactions. The transfer of shares will attract stamp duty at the rate of 0.3% on the consideration paid or market value of the shares, whichever is the higher.

However, stamp duty relief is available for the following circumstances, subject to meeting the pre-requisite conditions:

- If the acquisition of shares is in connection with a scheme of amalgamation or reconstruction of companies and where the consideration comprises substantially of shares in the transferee company; or
- If the shares are transferred between "associated companies". The transferor and transferee are "associated" if the transferor is the beneficial owner (either directly or indirectly) of not less than 90% of the issued share capital of the transferee or vice versa, or a third company is the beneficial owner (directly or indirectly) of not less than 90% of the issued share capital of the transferor and transferee respectively.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

Generally, no deduction is allowed for costs relating to the acquisition such as consultancy fees, legal fees or other professional fees. The cost of acquiring the shares is not deductible. The cost of assets acquired will qualify for capital allowances if it is a qualifying plant expenditure.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

The goods and services tax (GST) legislation will be repealed at a future date. In the interim, all taxable supplies have been zero-rated with effect from 1 June 2018. In place of GST, a sales and service tax (SST) regime will be introduced. However, SST should not apply to a transfer of asset or shares.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?

Malaysia does not impose withholding tax on dividends. However, there is withholding tax on interest, royalty and service fees paid to non-residents. The withholding tax rate may be reduced by the relevant tax treaty and hence, consideration should be given to this issue in the structuring of cross border investments into Malaysia.

There is no capital gains tax regime except for real property gains tax which is applicable to gains on the disposal of real property or shares in real property companies.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?

There are no legal provisions that provide for mergers of companies. Reconstruction or amalgamation of companies can be achieved by transferring the business undertaking or shares of one company to another. There may be stamp duty and real property gains tax implications associated with these transfers but exemptions are available, subject to conditions. Transfer of fixed assets between related companies are subject to the control transfer provision, as explained in question 3.

16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

The target company will be regarded as a real property company (RPC) if it owns real property (real estate) or shares in RPC or both, whereby the market value of these is not less than 75% of the value of its total tangible assets. Gains arising from the sale of RPC shares are subject to real property gains tax (RPGT)]. The sale of the real estate is also subject to RPGT. The RPGT payable may be different between a sale of the real estate and shares in a RPC due to the prescribed computational rules.

Besides RPGT, the sale of real estate and shares is subject to stamp duty. The stamp duty payable on shares is 0.3% on the consideration paid or market value of the shares, whichever is the higher whilst stamp duty payable on the sale of real estate is 1% to 3% on the sale consideration or market value, whichever is the higher.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

Group relief is available in relation to tax losses, subject to various conditions. Under the group relief, a company resident and incorporated in Malaysia may surrender up to 70% of its adjusted loss in the current year to one or more related companies that are resident and incorporated in Malaysia. The surrendering and claimant companies are related if at least 70% of the paid-up capital of the surrendering company is owned (directly or indirectly) by the claimant company or vice versa, or at least 70% of the paid up capital of the surrendering company and claimant company is owned (directly or indirectly) by another company resident and incorporated in Malaysia.

18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

Labuan is Malaysia’s international financial centre and offers a preferential tax regime for Labuan incorporated entities undertaking Labuan business activities. Labuan trading activities are taxed at a preferential rate of 3% of the net audited profits or a tax of RM20,000, depending on the election made by a Labuan entity. Income from non-trading activities such as the holding of investment in securities, stock, shares, deposits or any other properties are tax exempt. In addition, withholding tax does not apply to certain payments made by a Labuan entity to non-residents such as royalties, interest, dividend, lease rentals and service fees.

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

There are no adverse tax consequences on the transfer of ownership of intangibles provided that the gains arising from the transfer are not considered trading gains derived from Malaysia.

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

Malaysia does not have a capital gains tax regime except for real property gains tax (RPGT). RPGT is imposed on gains on disposals of real property located in Malaysia or shares in a real property company (RPC), as defined above. Where the disposer is a company, the RPGT rate is 30% if the disposal takes place within 3 years from the date of acquisition of the chargeable asset, 20% if the disposal takes place in the fourth year after the date of acquisition and 5% if the disposal takes place in the fifth year after the date of acquisition or thereafter.

Where the prior approval from the Malaysian Inland Revenue Board is obtained, exemption from RPGT is available in the case of a transfer of a chargeable asset between companies in the same group to bring about greater efficiency in operation, for a consideration consisting of shares in the company or substantially of shares in the company and the balance in cash.

21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES OR ASSETS ARE REINVESTED?

There is no fiscal advantage if the proceeds from the sale of shares are reinvested.

22. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

There are no specific local substance requirements for foreign holding companies. In order to enjoy reliefs accorded under Double Tax Agreements (DTAs), the Malaysian Inland Revenue Board in practice requires Malaysian taxpayers to maintain a tax resident certificate of the foreign company to demonstrate that a particular DTA is applicable. The substance over form approach is generally observed and the foreign company should be the beneficial owner of any payments received from Malaysian subsidiaries or group companies. However, Malaysia does not levy withholding tax on dividends. Hence, from a dividend repatriation perspective, the location of foreign holding companies is not significant. The Ministry of Finance and the Malaysian Inland Revenue Board have not announced any changes in this respect to take into account the BEPS initiative. However, it is believed that Malaysia, as a BEPS Associate, will review and update the local tax legislation to ensure that it is in line with the relevant BEPS Actions over time.

23. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

In relation to a transfer of business or real property, consideration needs to be given to the real property gains tax (RPGT), stamp duty and GST implications. Exemption from RPGT and stamp duty relief may be available if the pre-requisite conditions are met

MANAGEMENT INCENTIVES

24 WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

Some companies offer stock options and other types of share award schemes to senior employees as part of employees' reward and retention incentives. Benefits arising from stock options/share plans are taxable at exercise or vesting date, whichever is the case. The taxable value is the difference between the lower of the market value of the shares on exercisable and exercise date, less the offer price. Any gain arising from a subsequent disposal of the shares is not taxable. Where treasury shares are offered to employees under a stock option or share award scheme, the company is entitled to claim a tax deduction on cost incurred in acquiring the treasury shares.

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