Rödl & Partner

QUARTERLY ASEAN NEWSFLASH

EYE-LEVEL EXCHANGE

Issue:
Q4/2019

Latest news on law,
tax and business in ASEAN

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Read in this issue:

→ Note from the editor

→ Indonesia
- Amended provisions for distribution of goods in Indonesia

→ Malaysia
- Malaysia´ s Budget 2020
- Introduction of new Principal Hub Guidelines
- New penalty rates

→ Myanmar
- Myanmar improved in Ease of Doing Business ranking
- New tax administration law
- Further liberalization of banking sector
- Union Tax Law 2019

→ Singapore
- The Inward Re-Domiciliation regime in Singapore as option for a reorganization in times of disruption

→ Thailand
- Investment
- Economic development in Thailand
- Digital Asset Business

→ Vietnam
- New law on tax administration

→ Meet us at these upcoming ASEAN events

→ Ready for registration
- 3rd ASEAN Forum Singapore 13 February 2020

→ Note from the editor

Dear reader

Welcome to the Q4/2019 edition of our ASEAN Newsflash. In November we saw several developments which appear interesting from a European investment and trade perspective. The European Union-Singapore Free Trade Agreement was approved by the EU Council on 8 November 2019, and entered into force on 21 November 2019 as the first FTA between the EU and an ASEAN country.

Under the agreement, Singapore will remove all remaining tariffs on EU products and further open its market for EU services' providers, among others in sectors such as telecommunications, environmental services, engineering, computing and maritime transport. Singapore also agreed to remove obstacles to trade besides tariffs in key sectors, e.g. by recognizing the EU's safety tests for cars and several electronic appliances or by accepting labels for textiles used by EU companies. The EU-Singapore Investment Protection Agreement, as second part of the trade pact, is now in the process of ratification by the regional and national parliaments of the EU Member States, which might take at least two years.

Furthermore, the EU recently signaled to resume negotiations with Thailand on a free trade agreement (FTA), after suspension of trade talks following the 2014 military coup. The Council linked the decision to the general election in March 2019 that officially ended five years of military rule.

As a heads-up, our 3rd ASEAN Forum, which will take place in Singapore on 13 February 2020, will again be dedicated to provide you with inside views into business opportunities and challenges in ASEAN countries. We would be happy to personally meet you there, invitations will be distributed by separate email.

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→ Indonesia

Amended provisions for distribution of goods in Indonesia

President Joko Widodo reiterated his determination to improve Indonesia's investment climate at the Regional Leadership Communication Forum held on 13 November 2019 in Bogor, West Java. His remarks came amid the government's target to attract more investors to the country.

In light of reduced economic growth, Widodo's administration struggles to attract more investment into the country. The growth of investment, accounting for about a third of the country's GDP, plunged to 4.21 per cent in the third quarter, from 6.96 per cent recorded in the same period last year. Earlier in his inaugural address on 20 October, Widodo stated that the government must cut down on "all forms of obstructive regulation".

While the further legislative development to match this target remains to be seen, the Indonesian Minister of Trade made a careful first step in October by issuing Regulation No. 66 of 2019 as a long-awaited revision of Minister of Trade Regulation No. 22 of 2016 on General Provisions for Distribution of Goods. Regulation 22 has been criticized for regulating the sale of goods by their manufacturers to consumers too rigidly. Regulation 22 provided that sales to businesses or end consumers need to be carried out via a distributor and a retailer, with exception of direct sales of raw and supporting materials by manufacturers to other manufacturers. Distributors were not allowed to sell directly to manufacturers but needed to sell through a retailer. Moreover, manufacturers, except small and medium sized ones, were not allowed to directly sell to retailers but were only permitted to sell their goods to other manufacturers as raw or supporting materials. As each supply layer includes additional margins and value added tax imposition, the restrictions have been criticized as cost-inflating and negatively impacting consumers. For certain industrial goods like specialized or heavy machinery or high technologies, the requirements were also deemed unrealistic as there is usually no retailer available for such specific product types.

Foreign-investment companies (PMA) further face an earlier Regulation 11 of 2006 on registration of agents and distributors, which provides that PMA trading companies have to appoint a local intermediary, which could be either an agent or distributor, which led to a supply chain that included at least the PMA as distributor, a local agent or sub-distributor and a retailer.

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→ Malaysia

Malaysia´ s Budget 2020

Malaysia's 2020 Budget was announced on 11 October 2019, introducing measures that focus on:

a. Driving economic growth in the new economy and digital era;
b. Investing in Malaysians: Levelling up human capital;
c. Creating a united, inclusive and equitable society; and
d. Revitalization of public institutions and finances

KEY TAX PROPOSALS INTRODUCED IN THE 2020 BUDGET INCLUDE:

- SMALL AND MEDIUM ENTERPRISES ("SME") and Limited Liability Partnerships ("LLP") will be able to enjoy a preferential income tax rate of 17 per cent for the first MYR 600,000 of chargeable income, provided that their annual sales do not exceed MYR 50 million with effect from year of assessment ("YA") 2020;

- Companies will be eligible to claim special allowances for SMALL VALUE ASSETS with a value of up to MYR 2,000 per asset. For non-SME's, this option will be limited to MYR 20,000 per YA;

- Special tax deduction for SECRETARIAL AND TAX FILING FEES will be limited to a combined MYR 15,000 per YA;

- Companies in the ELECTRICAL AND ELECTRONICS SECTOR that have fully utilized the 15 year Reinvestment Allowance, will be granted an Investment Tax Allowance ("ITA") of 50 per cent on qualifying capital expenditure ("QCE") incurred within five years, to be set off against 50 per cent of statutory income for each YA;

- 100 per cent of ACCELERATED CAPITAL ALLOWANCE ("ACA") for automation equipment purchased by manufacturing companies will be extended by another three years until 2023;

- 70 per cent tax exemption for up to 10 years to be granted for SOLAR LEASING ACTIVITIES certified by the Sustainable Energy Development Authority ("SEDA");

- Resident individuals with a TAXABLE INCOME EXCEEDING MYR 2 MILLION, and non-resident individuals will be taxed at 30 per cent with effect from YA 2020;

- APPROVED MAJOR EXPORTER SCHEME – Traders and manufacturers of exempted goods with annual export sales of at least 80 per cent are qualified to apply for a full sales tax exemption on the importation and purchase of goods or raw materials, and are not required to determine the quantity of goods to be exported at the time of importation or purchase of goods effective from 1 July 2020;

- GROUP RELIEF FOR SERVICE TAX is to be allowed for taxable professional services (except for employment and security services) provided to a third party, subject to the condition that the value of services provided does not exceed 5 per cent of the total value of services provided within 12 months, effective from 1 January 2020;

- TRAINING AND COACHING SERVICES provided to disabled persons to be exempted from service tax, effective from 1 January 2020;

- REAL PROPERTY GAINS TAX ("RPGT") on disposals of real properties acquired prior to the year 2023, executed from 12 October 2019 onwards, carried out by Malaysian citizens and permanent residents after 5 years from the date of acquisition, the acquisition price used to compute the chargeable gain/loss shall be calculated based on the market value as at 1 January 2013;

- STAMP DUTY ON FOREIGN CURRENCY LOAN agreements will be increased from MYR 500 to MYR 2,000 effective 1 January 2020.

The 2020 Budget also highlighted changes to tax administration practices which are in line with the tax reform that is currently being discussed by the Malaysian government:

- Starting January 2021, Malaysians above the age of 18 and corporate entities will be assigned a TAX IDENTIFICATION NUMBER OR TIN;

- The Special Commissioner of Income Tax and Customs Appeal Tribunal will be merged into the

Tax Appeal Tribunal, which will come into operation in 2021;

- A comprehensive REVIEW OF THE EXISTING TAX INCENTIVE FRAMEWORK is being carried out by the Malaysian government and is expected to be ready by January 2021.

→ Malaysia

Introduction of new Principal Hub Guidelines

The Principal Hub incentive was introduced in 2015 with the objective of strengthening Malaysia's position as a competitive regional and global operation base. Since its introduction, the Principal Hub incentive has been progressively enhanced, with the latest amendment being the concessionary income tax rate of 10 per cent on the overall statutory income relating to the Principal Hub's activities of existing companies for 5 years.

The new requirements are in line with the recommendation from the review of the Harmful Tax Practices to comply with the Base Erosion and Profit Shifting ("BEPS") initiative by the OECD.

The main changes to the Principal Hub Guidelines include the following:

- The TAX EXEMPTION given to existing companies with approved PRINCIPAL HUB STATUS was previously computed on the value added income from Principal Hub activities. This has now been replaced with a concessionary flat rate of 10 per cent applicable to the statutory income from Principal Hub activities;

- Previously, a Principal Hub has been required to provide services to network companies in 3 countries outside Malaysia. This requirement has been removed retroactively to YA 2018. However, a Principal Hub is REQUIRED TO SERVE AND CONTROL A SPECIFIED MINIMUM NUMBER (10 OR 15) OF NETWORK COMPANIES. A network company is defined as (a) related companies or entities within the same group, i.e. subsidiary, branch or joint venture; or (b) non-related companies having a contractual agreement with the Principal Hub or its ultimate company with regard to Principal Hub's business and supply chain for at least 3 years;

- The 10 per cent tax exemption (Tier 3) for new companies has been removed;

- Under the previous Principal Hub guidelines, companies without incentives that have been granted this incentive could enjoy a 5 year incentive period that might be extended for another 5 years. Under the new guidelines, the 5 year extension has been removed;

- COMMODITY BASED COMPANIES are no longer eligible for the Principal Hub incentive;

- Apart from Regional P&L/Business Unit Management, STRATEGIC BUSINESS PLANNING AND CORPORATE DEVELOPMENT has been added as another compulsory core income generating activity;

- Companies applying for an exemption on their trading income now have to satisfy an INCREASED MINIMUM ANNUAL SALE OF GOODS requirement, i.e. increased from MYR 300 million to MYR 500 million. However, there is no specific time frame given within which companies are to achieve this level of annual sales;

- There is an INCREASED COMMITMENT OF ANNUAL OPERATING EXPENDITURE to be incurred. The annual operating expenditure has been increased from MYR 5 million to the higher MYR 10 million, or the average operating expenditure for the 3 years + 30 per cent. Operating expenditure excludes the cost of goods sold, depreciation and interest on borrowings;

- Existing companies which are granted the Principal Hub incentive are required to conduct a structured internship program or equivalent training schemes introduced by TALENTCORP, and structured training programs for their own workforce;

- Royalties and other income derived from INTELLECTUAL PROPERTY RIGHTS are excluded from the Principal Hub incentive.

These new requirements apply for applications received by the Malaysian Investment Development Authority ("MIDA") from 1 January 2019, as well as pre-January 2019 applications which have not yet been approved. New applications must be submitted to MIDA by 31 December 2020.

→ Malaysia

New penalty rates

The Malaysian Inland Revenue Board ("MIRB") has issued new Operational Guidelines GPHDN 5/2019 – Imposition of Penalties under Subsection 112(3) of the Malaysian Income Tax Act, 1967, Subsection 51(3) of the Petroleum (Income Tax) Act 1967, and subsection 29(3) of the Real Property Gains Tax Act 1976, dated 16 October 2019 and effective 1 October 2019. This new Guidelines revoke the Operational Guidelines GPHDN 1/2015 dated 5 March 2015 which only covered penalties under subsection 112(3) of the Income Tax Act, 1967.

The penalty rates provided under the new Guidelines are set out in the table below.

PENALTY FOR LATE FILING OF TAX RETURN

Duration of delay in submission computed from statutory filing due date	Income Tax Act, 1967		Petroleum (Income Tax) Act, 1967	Real Property Gains Tax Act 1967
	Old guidelines	New guidelines		
Within 12 months	20%	15%	15%	15%
Between 12 and 24 months	25%	30%	30%	20%
Between 24 and 36 months	30%	45%	45%	25%
More than 36 months	35%			

PENALTY FOR FAILURE TO SUBMIT TAX RETURN

Legislation	Old guidelines	New guidelines
Income Tax Act, 1967	Up to 3 times of the tax payable	45%
Petroleum (Income Tax) Act, 1967	Not covered under the old guidelines	
Real Property Gains Tax Act, 1976		25%

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→ Myanmar

Myanmar improved in Ease of Doing Business ranking

On 24 October 2019, the World Bank Group released the Doing Business report 2020. In this year's Ease of Doing Business ranking, which is an indication for the position of an economy relative to that of other economies, Myanmar was among the top 20 improvers and moved up 6 places compared to last year's ranking, reaching position 165 from 190 rated economies.

According to the World Bank, Myanmar substantially improved in five areas of doing business: starting a business, protecting minority investors, dealing with construction permits, registering property and enforcing contracts.

With last year's introduction of the MyCo (Myanmar Companies Online) system, an online registry platform for companies, the registration procedures for new as well as for existing companies replaced an outdated paper-based system and was a visible step towards the e-government. Furthermore, governmental fees for registrations have been significantly reduced, thus lowering administrative expenses for companies.

With the current legal and tax reforms seconded by further liberalization in various key economic sectors, the Myanmar government plans to ascend the Ease of Doing Business ranking even faster in the upcoming years, aiming to be among the top 100 countries in the near future.

→ Myanmar

New tax administration law

On 1 October 2019, marking the beginning of the new financial year, the new tax administration law came into effect, regulating rights and obligations of tax payers as well as the duties and responsibilities of tax authorities to facilitate transparency and fairness in the tax system. The new tax administration law provides guidance on administrative procedures under the Income, Commercial, Special Goods and Union Tax Law.

Individual Tax Identification numbers and tax registration cards will simplify filing procedures and improve a fair tax collection, equal to all taxpayers.

The tax administration law also provides for a possibility to apply for extensions of filing deadlines, however the approval depends on the Internal Revenue Department (IRD). If the IRD does not reply to applications for extensions of deadlines within 30 days, the application is automatically granted. An interest rate (to be defined) on tax amounts applies to unpaid or underpaid taxes as well as to tax payments on installments, which also have to be applied for in advance.

The record keeping for accounting and supporting documents is set to 7 years from the filing or transaction date, and the tax returns can be re-assessed 6 years after the initial assessment. If tax assessments are based on fraud or incomplete information, the IRD might re-assess tax returns until 12 years after the initial assessment.

The new tax administration law also includes hefty penalties on offences, such as 25 to 75 per cent on the tax amount for fraud, and possible imprisonment on tax evasion. But also late filings of tax returns will be penalized with 5 per cent on the tax amount or 1 Lakh (≈ 66 USD), and 1 per cent interest per month on the tax amount. Late filings of taxes will be penalized with 10 per cent, missing or wrong information by the tax payer with 10 per cent on the tax amount as well.

In general, the new tax administration law is a further step into a more fair and equal tax system and part of a long term effort to rebuild an antiquated tax regime. It is part of a long term plan also towards e-filings and self-assessment which reflects an historic effort towards an up-to-date tax regime, also supported, amongst other international organizations, by the IMF and the World Bank.

→ Myanmar

Further liberalization of banking sector

On 7 November 2019, the Central Bank of Myanmar announced that with effect of 1 January 2020, it will allow for foreign banks to invest in local banks, exceeding share amounts of 35 per cent, but subject to case by case decisions. This decision technically opens up the local banking sector completely to foreign banks and investors and represents an unprecedented liberalization in this field.

Additionally, foreign banks with a representative office in Myanmar are now able to apply for a branch license which enables the bank to open one place of business to offer wholesale banking services. The minimal capital investment is set to 75 mio. USD, 40 mio. USD of which are locked for two years, contrary to a subsidiary license with a minimum capital of 100 mio. USD for operation which enables the bank to open up to 10 places of business (including ATMs) to provide wholesale, and from 1 January 2021 onwards also onshore retail banking activities.

Already existing foreign bank branches which have been operating in Myanmar for more than 3 full years might convert into a subsidiary by mid of 2020.

This is the 3rd round of foreign bank licensing, after the first in 2014 and the second in 2016, announced by the Central Bank of Myanmar to liberalize the domestic banking market and to attract more foreign direct investment.

→ Myanmar

Union Tax Law 2019

On 24 September 2019, the Pyidaungsu Hluttaw (Union Parliament) passed the Union Tax Law 2019 entering into effect as of 1 October 2019, following the beginning of the new financial year in Myanmar.

One of the major changes under the new Union Tax Law is a conditional amnesty on the source of undisclosed income which lasts from 1 October 2019 until 30 September 2020 to encourage taxpayers to get compliant with income derived before 1 October 2019.

Last year's similar proposal was rejected by the Parliament out of fairness concerns. If the taxpayer invests into a new business or is acquiring/expanding an existing one, is investing into construction or purchasing capital assets, the income tax rates on the remaining income of undisclosed source are significantly reduced to below rates compared to the Union Tax Law 2018-19.

Old income layers	New income layers	Old income tax rates	New income tax rates
1 – 30,000,000 MMK	1 – 100,000,000 MMK	15%	3%
30,000,001 – 100,000,000 MMK	100,000,001 – 300,000,000 MMK	20%	5%
100,000,001 MMK - above	300,000,001 – 1,000,000,000 MMK	30%	10%
./.	1,000,000,001 – 3,000,000,000 MMK	./.	15%
./.	3,000,000,001 – above	./.	30%

The Union Tax Law 2019 also includes several changes to the Special Goods Tax and Jewelry Tax as well as minor amendments in the Commercial Tax. For further questions, please do not hesitate to contact us.

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→ Singapore

The Inward Re-Domiciliation regime in Singapore as option for a reorganization in times of disruption

Foreign companies in the Asia-Pacific region are facing several challenges which might lead to a reconsideration of their current set-up in the region. In particular, the regulatory, tax and tariff landscape is changing rapidly with potential impacts within the value chain of companies. The current and potential future impacts are multifold, such as the OECD BEPS 2.0 proposal which, once effective, might change the tax environment drastically. Tariff and non-tariff trade barriers have moved back to the spotlight, and ongoing trade disputes between countries in the region – such as between the USA and China or between Japan and Korea –, or new trade agreements such as the EU-Singapore Free Trade Agreement might influence companies upon value chain related decisions. Last but not least, political events, such as the ongoing situation in Hong Kong, might as well make an impact on decisions regarding the corporate set-up and the regional value chain.

Once the challenges and their current or potential future impact have been assessed and understood, companies might need to consider amending their current set-up to remain competitive. Corporate reorganization could be archived by new incorporations, transfer of assets and liquidation of existing legal entities. However, such process might be lengthy and costly, it might require the consent or approval of other parties or authorities when it comes to the transfer of assets or to the liquidations, and might also trigger taxes on the transfer of assets. If applicable, such corporate reorganization might be easier and more cost-efficient when utilizing corporate conversion schemes. Depending on the respective applying laws, corporate conversion can mean among others the change of the legal form, change of the legal seat or a merger of entities.

Within single markets which comprise more than one jurisdiction, unified rules on corporate conversion can be highly beneficial for companies to adjust their set-up to meet market demands and to stay competitive. Within the EU single market, certain rules are applying for cross-border mergers or the change of seat. The ASEAN Economic Community intends to create a single market, but has not yet provided any rules on cross-border corporate conversions. Thus, the question of whether corporate conversion rules can be utilized depends on national law. Companies Act of Singapore.

In 2017, the Companies Act of Singapore has been amended and an inward re-domiciliation regime has been introduced under part XA of the Companies Act. This regime allows for a foreign company to convert into a Singapore-registered company (transfer the place of registration by maintaining the legal identity), if the requirements stipulated in the Companies Act and in the Companies (Transfer of Registration) Regulation 2017 are satisfied.

The foreign company must meet size and solvency criteria to be eligible for an inward re-domiciliation. As for the size criteria, two of the following three criteria must be met: (i) the value of the foreign company's total asset exceeds SGD 10 million; (ii) the annual revenue of the foreign company exceeds SGD 10 million; or (iii) the foreign company has more than 50 employees. Furthermore, the foreign company must be solvent and be able to pay its debt among others for a period of 12 months after the date of application for the re-domiciliation. The directors of the foreign company have to provide a statutory declaration on the solvency.

The foreign company also has to satisfy legal requirements. Among others, the law of the place of incorporation must allow for the foreign company to transfer its incorporation. Several countries do not permit the re-domiciliation to another country. Hong Kong, for example, does not provide a re-domiciliation regime. Other countries in the region, Australia, the Philippines and Brunei, but also countries which are considered tax havens such as British Virgin Island, Cayman Island, Cyprus and Labuan seem to provide rules for a re-domiciliation.

The inward re-domiciliation regime of Singapore provides companies with an interesting tool for a corporate reorganization. Its application, the implementation of such re-domiciliation and the impact on the value chain of the respective company require proper assessment and planning.

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→ Thailand

Investment

BOI – THAILAND PLUS

On 6 September 2019, the Thai Board of Investment (BOI) approved a new incentive package dubbed "Thailand Plus" to further attract investment and to improve Thailand's ranking in the ease of doing business index. The BOI also announced that they are continuing to look into extending the existing smart visa scheme to attract foreign talents to Thailand.

The package aims to enhance Thailand's attractiveness as an investment location by different tax and non-tax incentives as follows:

1. Investment projects worth at least THB 1 billion can be eligible for an additional CORPORATE INCOME TAX REDUCTION of 50 per cent for an additional 5 years if certain requirements are met;

2. PROMOTED PROJECTS will be eligible for a special deduction of expenses related to training (reskilling and upskilling). Furthermore, promoted projects may deduct expenses incurred by hiring highly skilled employees in the fields of science and technology;

3. INVESTMENT IN AUTOMATION EQUIPMENT shall be eligible for a double deduction for tax purposes.

4. Thailand will establish a NEW STEERING COMMITTEE for the coordination and facilitation of projects, especially large investment projects. Ideally, the investor would receive a One-Stop Service provided by the BOI covering all required steps of the investment.

DEPARTMENT OF BUSINESS DEVELOPMENT – FOREIGN BUSINESS LICENSE

The Ministry of Commerce, Department of Business Development, has announced considerations to delete certain businesses from list 3 of the Thai Foreign Business Act. In general, foreigners are required to obtain a Foreign Business License to engage in business activities mentioned on list 3. The following businesses shall be deleted from list 3:

- telecommunication services for business operators not having their own network;
- treasury centers;
- aviation maintenance; and
- software development.

If the government approves the deletions, foreigners could engage in these businesses without obtaining a Foreign Business License from the Department of Business Development. Please to note though that other license requirements by other regulatory authorities still apply. The liberalization would further strengthen Thailand´ s position as one of the best investment locations in Southeast Asia.

→ Thailand

Economic development in Thailand

BANK OF THAILAND - CUT OF INTEREST RATE

During the last year, the Thai Baht significantly strengthened its value against the US Dollar and the Euro, jeopardizing Thailand's overall competitiveness, especially regarding exports. As a remedy, the Bank of Thailand cut the benchmark interest rate by 0.25 percentage points in August, and by another 0.25 percentage points in November to 1.25 per cent.

GROWTH FORECAST

Thailand's economy seems to slightly slow-down. After a lower than expected third quarter in 2019, the Joint Standing Committee on Commerce, Industry and Banking lowered its forecasted growth of Thailand's GDP to a range of 2.7 per cent to 3.0 per cent (from previously 2.9 per cent and 3.3 per cent).

SUSPENSION OF US- TRADE PREFERENCES

The US Trade Representative announced that the USA will suspend the preferential treatment of over 570 products originating in Thailand from end of April 2020 onward, namely all kinds of seafood, a variety of fruits, vegetables, garment products, and electrical appliances. The US Trade Representative said that the decision was based on an alleged lack of worker's rights in Thailand's fishing industry. The government of Thailand announced that it will enter into discussions with the USA to solve the issue.

FREE TRADE AGREEMENT WITH THE EUROPEAN UNION

The European Union and Thailand have decided to resume negotiations on a Free Trade Agreement. The EU suspended earlier trade talks in light of the military coup of 2014. Thailand is already holding public hearings to study the opportunities and challenges of an EU-Thailand FTA. The initial assessment assumes that an FTA would have a significant impact on Thailand's economic growth and the overall development of the country. Thailand remains one of the most important destinations for European Investments within ASEAN. An FTA would ease the existing trade while furthermore create substantial business opportunities and simplify direct investment.

→ Thailand

Digital Asset Business

FIRST ICO PORTAL APPROVED BY THAILAND'S SECURITIES AND EXCHANGE COMMISSION

The SEC has approved the first platform to conduct initial coin offerings in Thailand. Under Thailand's regulations on Digital Asset Businesses B.E. 2561, initial coin offerings require operators to obtain prior approval by the SEC. ICO portals facilitate the offering of newly issued digital tokens. Digital assets businesses such as exchange platforms, brokers and dealers also require approval from the SEC. Thailand was one of the first countries in the region to provide comprehensive regulations regarding the offering and trading of digital tokens.

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→ Vietnam

New law on tax administration

KEY ISSUES

On 13 June 2019, the National Assembly of Vietnam enacted the new Law on Tax Administration ("New LTA") in their all-out effort to establish an effective tax regime by setting fundamental and far-reaching principles of tax risk management in order to protect their tax bases and to tackle tax challenges in harmony with the policies of the OECD/G20 Inclusive Framework on BEPs in which Vietnam is involved.

Compared to the current tax framework, the New LTA establishes notable changes in the implementation policies to move forward step-by-step to an efficient tax collection mechanism. Specifically, the New LTA identifies the neuralgic spot at which certain cross-border transactions have been closely associated with tax risks in order to safeguard the tax sovereignty of the Vietnamese taxation authorities over such transactions.

The New LTA will come into force as of 1 July 2020. This Alert spotlights some issues which will be subject of the domestic tax reform in Vietnam in the forthcoming.

TAX ADMINISTRATION IN THE DIGITAL ECONOMY

Recent years have witnessed a rapid growth as to the e-commerce penetration rate in the Vietnamese market. While the advent of the digital economy undoubtedly creates many new channels to spread out market reach on a global scale, it is nevertheless alleged to pose tax challenges to the Vietnam jurisdiction when tax liabilities in cross-border transactions, which should have been levied by the Vietnamese tax authorities, could be evaded.

To level the playing field for the bricks and mortar businesses and online businesses in view of the Vietnamese tax environment, the New LTA proposes the following solutions to mitigate base erosion and profit shifting (BEPs) availed by the digital players.

1. Strengthening Vietnam's taxing rights to international e-commerce transactions

Under the existing tax legislation, there are two underlying taxes - Value Added Tax ("VAT") and Corporate Income Tax ("CIT") – to be imposed on foreign entities carrying on business in Vietnam by the Vietnamese tax authorities. In the concept of nexus rules, these taxes shall be levied on businesses with a local physical presence in Vietnam; and each party involved shall conduct tax declaration and payment on its own. Otherwise, such business may be subject to the foreign contractor withholding tax ("FCWT") regime, inclusive of VAT and CIT components. According to the FCWT regime, there is a reverse charge system possible in connection with the taxation imposed on foreign entities. Thereby, the obligation to pay VAT and/or CIT may be moved from the foreign sellers to the buyers of goods/services - being taxpayers in Vietnam. In other words, the FCWT mechanism requires Vietnamese buyers to be liable to withhold the corresponding amount of CIT and VAT prior to proceeding the payment to foreign sellers.

However, there are concerns about how the FCWT regime may control e-commerce transactions being business-to-consumer (B2C) or consumer-to-customer (C2C) transactions, while the prevailing legal regulations stipulate the withholding agents to be limited to organizations or businesspersons purchasing goods and/or services from offshore suppliers. It appears that the tax management in B2C and C2C transactions is not considered appropriate in the existing FCWT regime due to highly digitalized business models.

For the time being, a large volume of cross-border businesses transacted by foreign entities on media platforms and online marketplaces manage to avoid taxation by the Vietnamese jurisdiction for certain reasons; namely because of not having a permanent establishment in Vietnam, or because of the current FCWT regime not covering B2C and C2C transactions in which the parties involved are not organizations or businesspersons.

In reaction to these tax challenges posed by digitalization, the New LTA stipulates the relevant parties to comply with the following obligations for the purpose of tax administration:

Obligations of foreign suppliers doing business via intermediate digital platforms of which the income is generated from Vietnam:

In such circumstance, offshore suppliers are required to conduct tax registration and payment in Vietnam by themselves or to authorize third party(ies) to perform such obligations in their stead. The foreign supplier shall be assigned a tax code to be used for tax declaration and payment purposes.

Obligations of competent authorities:

There is a great deal of new provisions introduced with the New LTA to vest the authority of tax administration in Vietnam agencies. Most emphatically, it is the first time that a substantive law stresses the responsibilities of coordination in tax administration between not only taxation agencies, but also ministries, ministry-level agencies, governmental agencies, the State Bank of Vietnam (SBV) and commercial banks. Notably, in addition to the withholding model applied to Vietnamese contracting parties in e-commerce transactions, the New LTA regulates the rights and liabilities of commercial banks to withhold and remit tax(es) on behalf of offshore organizations and individuals doing e-commerce business and deriving income from Vietnam. This new tax collection model for cross-border e-business activities breaking new grounds, we note that the current state is a policy design phase and, therefore further specific guidance to avoid practical difficulties in applying this model is being drafted by the Vietnamese lawmaker.

2. Adopting transfer-pricing regulations

Amongst the measures to streamline the tax framework emphasized by the New LTA, the adoption of the arm's length and of the substance over form principles are at the heart of the transfer pricing regulations. The by-law documents, Decree No. 20/2017/ND-CP and Circular 41/2017/TT-BTC, enacted prior to the LTA have given detailed guidance on the implementation of the transfer-pricing regulations.

The adoption of advance pricing arrangements (APAs) in determination of the taxed price is required to be approved by the Ministry of Finance prior to the application in transactions between related parties.

3. Modernizing the tax administration system

In consistency with the current Decree 119/2018/ND-CP promulgating e-invoices to be used in the sale and purchase of goods and services, and with Circular 68/2019/TT-BTC guiding a number of articles of Decree 119/2018/ND-CP, the New LTA stipulates the roadmap for the use of e-invoice and e-documentation in tax administration. The implementation of the New LTA's provisions in relation with e-invoices will officially start on 1 July 2020. As a matter of practice, any agencies, organizations and individuals are encouraged to apply e-invoices and e-documentation regulations prior to the statutory effective date of such regulatory regimes.

OTHER SUBSTANTIAL CHANGES

Circumstances subject to “moratorium of tax debts” (in Vietnamese words: khoanh tiền thuế nợ)

The New LTA specifies the circumstances under which the taxpayer is permitted to defer his due tax liabilities from being considered as a debt for which penalties and/or late payment interest on due tax amounts might be charged.

There are certain specific circumstances subject to “moratorium of tax debts” prescribed by the New LTA:

- The taxpayer is deceased or is declared by a competent court to be deceased, or missing or to have lost capacity for civil acts;
- The taxpayer is carrying out dissolution procedures in compliance with the relevant orders and procedures in terms of taxation and enterprise perspective;
- The taxpayer, or the party having related rights and obligations, has lodged the petition to commence bankruptcy in accordance with relevant applicable laws;
- The taxpayer is no longer conducting business at the registered business address after the competent authorities duly verified such non-presence of taxpayer and gave nationwide notice of this fact; or there is no presence of a legal representative of the taxpayer at the contact address registered with the tax authorities.
- The tax authority addresses a proposal in writing about the revocation of incorporation licenses of the taxpayer; or the incorporation licenses of the taxpayer are revoked by the competent licensing authorities.

It is advised that the taxpayer shall take into account the occurrence of such circumstances in their business life, and strive to comply with the compulsory procedures and application dossier to mitigate undesirable tax consequences.

Piercing the corporate veil in the event of compulsory enforcement of administrative regulations

The individual being as the legal representative of the taxable entity enforced compulsorily to fulfil tax payment obligations under an administrative decision on tax management, may be subject to suspension of emigration in accordance with the law on entry and exit. As such, foreign legal representatives of Vietnam-based companies should be careful about the matters of tax compliance of his/her company, as they may give rise to the risk of being suspended for emigration.

Re-inspection during tax inspection activities

In cases where a conclusion on tax administration is detected to infringe the regulations prescribed in the New LTA, the competent authorities are entitled to a re-inspection. The limitation period for re-inspection is two years from the date of signing an inspection conclusion.

In addition to the aforementioned substantial changes, the New LTA also comprises further changes, such as the exemption from penalties and late payment interest imposed on tax shortfall in case of a taxpayer relying on the decision of the competent taxation authorities, the taxpayers’ entitlement to interest accrued on tax refund where they are prevailing parties in tax disputes, etc.

CONCLUSION

While the detailed tax guidance is still being drafted owing to the tax challenges correlating with the increasingly digitalized economy, the likelihood is that the new approach to tax risk management will soon be factored in Vietnamese tax policies. A full awareness of the current tax environment is therefore crucial to the management of tax compliance risks.

Focusing on the tax compliance matters and having the high benchmark for providing tax services with an interdisciplinary approach and a global reach, Rödl & Partner are able to assist clients in their business success through our innovative and effective tax solutions.

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