THOMSON REUTERS

ISSUE 5, 5 February 2016

(Country reports by Terry Hayes, Mabel Joyce Vergara and Paul Vicente Curimao, V; Edited by Terry Hayes and Keith Koo)

PRACTITIONER ARTICLE

[1]. Transfer pricing simplification in Australia: More space between "transfer pricing flags in the sand" – businesses need to continually review their arrangements - *by Denise Honey - Executive Director/Partner, Jake Meyer - Senior Manager and Carlee Diegan - Analyst, Pitcher Partners Melbourne*

ASIAN TAX AND TRADE NEWS AND UPDATES

SINGAPORE

[2]. Public feedback sought on Budget 2016

[3]. Individual tax filing requirements for frequent business travellers

[4]. Singapore cooperates closely on money laundering

PHILIPPINES

[5]. CIR loses appeal re VAT, deficiency income and withholding tax assessments – *Staedtler* case

MALAYSIA

[6]. Tax amnesty enables evaders to avoid penalties

[7]. Customs updates GST guide on property management

[8]. Malaysia-EU FTA to be finalised soon

[9]. Swiss seek Malaysian help probing alleged US$4 billion financial misappropriations

THAILAND

[10]. New DTA between Thailand and India

VIETNAM

[11]. Full text of EU-Vietnam Free Trade Agreement published

[12]. Car imports drop after luxury tax increase

CHINA

[13]. Tax breaks for small businesses reach 100 billion yuan

[14]. Companies get much needed tax relief

[15]. Mutual Assistance in Tax Matters Convention has entered into force for China

[16]. Tax exemption expanded for certain governmental funds

[17]. MOF and SAT define preferential tax policies for public rental housing

[18]. Employee views of corporate tax aggressiveness in China

[19]. China may digitise RMB – would help combat tax evasion

[20]. China still attractive to foreign investors: State Council

[21]. Families of expats can stay longer in Beijing

[22]. New rule to allow 6 days without visa

EU Parliament backs Trade in Services agreement – agrees that China should join – see para [58]

HONG KONG

[23]. Stamp duty on Mutual Recognition of Funds between Mainland and Hong Kong

[24]. Temporary suspension of tax return filing via eTAX

[25]. DTA between Australia and Hong Kong to be negotiated

[26]. TIEA between Hong Kong and Poland under negotiation

[27]. Complaints about delays in stamp duty adjudication

[28]. InvestHK assists record number of overseas and Mainland companies to set up or expand in Hong Kong

INDIA

[29]. Resolution of more than 100 cases of transfer pricing disputes with USA

[30]. CBDT signs 2 new bilateral APAs with India entities of UK-based MNC

[31]. Finance Minister encourages Opposition to support GST

[32]. Payments for software not royalties if for resale – *M Tech India P Ltd* case

[33]. Mines ministry proposes scrapping export tax on iron ore from Goa

[34]. India moving to eliminate "bad" subsidies: PM

[35]. Finance Minister could squeeze business to balance books

[36]. Managerial services not FTS under India-UK DTA – *Cummins Ltd* case

[37]. Installation project not a PE under India-Singapore DTA – *Tiong Woon* case

[38]. Transfer of shares: capital gain exempt under India-Mauritius DTA - *Dow AgroSciences* case

[39]. Brought forward losses disallowed after change of "beneficial ownership" – *Yum Restaurants (India)* case

[40]. Settlement received by foreign investors for right to sue not assessable – *Aberdeen Claims* case

[41]. Subsidy granted to set up a wind project is capital receipt

US to accept Bilateral APA applications from India – see para [52]

JAPAN

[42]. Japan's Draft Budget for FY2016 – some details

[43]. Japan and Switzerland sign auto exchange of information agreement

[44]. Japan and Slovenia agree in principle on DTA

SOUTH KOREA

[45]. South Korea releases economic stimulus package – tax on cars to be cut

TRANS-PACIFIC PARTNERSHIP

[46]. TPP Agreement signed

[47]. Calls for US White House to address Congressional concerns re the TPP

TAX AND TRADE NEWS OF WIDER INTEREST

BEPS NEWS

[48]. Could BEPS force the US to end its worldwide system of taxation?

[49]. What's ahead for the BEPS regime? PwC

[50]. CbC reporting - how businesses can prepare – Deloitte

EU NEWS

[51]. EU antitrust chief rejects US criticism of Apple, Starbucks tax cases

UNITED STATES

[52]. US to accept Bilateral APA applications between US and India

UNITED KINGDOM

[53]. Non-UK domiciles to be subject to UK income tax and CGT – policy paper released

AUSTRALIA

[54]. Multinationals and new anti-avoidance law - ATO identifies new taxpayers

[55]. Australia's largest-ever trade mission to China in April 2016

[56]. New rates of excise duty and customs duty for alcohol and fuels

NEW ZEALAND

[57]. DTA between New Zealand and Samoa enters into force

WORLD TRADE DEVELOPMENTS

[58]. EU Parliament backs Trade in Services agreement – agrees that China should join

[59]. EU seeks to bring US trade talks towards a close by mid-year

RECENT TAX ARTICLES

[60]. Recent tax articles of interest

PRACTITIONER ARTICLES

[1]. TRANSFER PRICING SIMPLIFICATION IN AUSTRALIA: MORE SPACE BETWEEN "TRANSFER PRICING FLAGS IN THE SAND" – BUSINESSES NEED TO CONTINUALLY REVIEW THEIR ARRANGEMENTS - *BY*

DENISE HONEY - EXECUTIVE DIRECTOR/PARTNER, JAKE MEYER - SENIOR MANAGER AND CARLEE DIEGAN - ANALYST, PITCHER PARTNERS MELBOURNE

[*Pitcher Partners is the Australian member network of the Baker Tilly International association of independent member firms*.]

On 7 January 2016, the ATO updated its online guide "Simplifying transfer pricing record keeping" (**the online guide**) on its general website to include 3 new options, in addition to the 4 original options previously published in December 2014.

The updates to the guide appear to be an attempt to reconcile the simplification options introduced in December 2014 with the ATO's previous administrative practices for intra-group services under Taxation Ruling TR 1999/1. The 3 new simplification options are:

- Materiality;
- Management and administration services (**G&A Services**); and
- Technical services (**Tech Services**).

With the addition of the 3 new options, the 7 simplified transfer pricing record-keeping options are now:

- Materiality.
- Small business taxpayers.
- Distributors.
- Intra-group services.
- Management and administration services.
- Technical services.
- Low level loans - inbound.

Taxpayers who have related party dealings with entities in specified countries continue to remain ineligible for any of the simplified transfer pricing record keeping concessions. [The specified countries include Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Guernsey, Isle of Man, Jersey, Liechtenstein, Monaco, Nauru, Saint Lucia, US Virgin Islands - the full list is on the ATO website.] However, taxpayers with sustained losses and/or restructures will not be locked out of these new simplification options.

Summary of all 7 simplified record keeping options

All 7 options require taxpayers to self-assess their compliance with Australia's transfer pricing rules. We have summarised the criteria for each simplified transfer pricing record keeping option below.

Options for particular classes of taxpayers

Eligibility conditions	Small business taxpayer	Distributors
Maximum turnover for *Australian economic group* - defined as the taxpayer entity together with all the entities it is required by the Australian accounting standards to include in consolidated financial statements	AUD 25 million	AUD 50 million
Sustained losses - defined as the incurring of losses for three or more consecutive income years, including the year for which the taxpayer is assessing its eligibility to apply one or more of the options.	Cannot have	Cannot have
International Related Party Dealing (IRPD)s with *specified countries* - those countries listed in the ATO's online guide, primarily low-tax or no-tax jurisdictions such as the Cayman Islands and Bermuda	Cannot have	Cannot have
***Restructure* in relevant income year** - defined as an arrangement in which assets, functions or risks of a business are transferred between international related parties – refer to Taxation Ruling TR 2011/1 Income tax: *application of the transfer pricing provisions to business restructuring by multinational enterprises* for further information.	Cannot have	Cannot have
IRPDs involving royalties, license fees or R&D arrangements	Cannot have	Cannot have
Relevant ratio thresholds	*Specified services* related IRPDs ≤ 15% of turnover. Specified services include services related to IP, R&D, software development, insurance, financial trading and strategic customer sales or relationship activities	Profit-before-tax ratio ≥ 3%.
Other requirements	Taxpayer is not a distributor	Taxpayer is a *distributor*. Taxpayer is a distributor if its main business activity – as input in tax return – has an ANZIC Wholesale Trade code

Less than or equal to: ≤, Greater than or equal to: ≥

Importantly, these options do not apply to financial transactions or IRPDs of a capital nature.

Options for particular classes of IRPDs

Relevant type of IRPDs:	All	Services			Interest expenses
Options: / Eligibility conditions	**Materiality**	**Intra-group Services**	**G&A Services**	**Tech Services**	**Low level inbound loans**
Sustained losses	OK	Cannot have	OK	OK	Cannot have
IRPDs with specified countries	Cannot have	Cannot have	Cannot have	Cannot have	Cannot have
Restructure in relevant income year	OK	Cannot have	OK	OK	Cannot have
Relevant IRPD thresholds for *Australian economic group*	Total IRPDs represent ≤to 2.5% of total turnover	Service IRPDs ≤ AUD 1 million, or: total expense amount for services received ≤ 15% of total expenses; or total income amount for services provided ≤ 15% of total revenue	G&A Services must be ≤ 50% of the total IRPDs.	Tech Services must be ≤ 50% of the total IRPDs	Cross-border loan balance of ≤ AUD 50 million
Relevant transfer pricing methods/ parameters	N/A	Mark-up on costs of the relevant services of either: ≤ 7.5% for services received; or ≥ 7.5% for services provided.	Mark-up on costs of the relevant services of either: ≤ 5% for services received; or ≥ 5% for services provided.	Mark-up on costs of the relevant services of either: ≤ 10% for services received; or ≥ 10% for services provided.	Interest rate is ≤ to the Reserve Bank of Australia indicator lending rate for 'small business; variable; residential-secured; term".
Other requirements	No IRPDs involving royalties, licence fees or R&D.	No specified services IRPDs	N/A	N/A	Only applies to inbound loans where funds are provided in AUD and outgoings are paid in AUD under terms of written loan agreement

Less than or equal to: ≤, Greater than or equal to: ≥

None of the options above apply to IRPDs of a capital nature, nor do the services options apply to financial transactions.

Background

In December 2014, the ATO released its "Simplifying transfer pricing record keeping" guide (**the December 2014 guide**) setting out the simplified transfer pricing record keeping options that eligible taxpayers could use to minimise their documentation obligations and compliance costs.

The introduction of the simplified transfer pricing record keeping options sought to ease some of the compliance burden for the middle market and recognised that for some taxpayers, the administrative burden of preparing documentation that complying with Australia's relatively new transfer pricing regime can often be disproportionate to the transfer pricing risk associated with those taxpayers.

At the time of the December 2014 guide's introduction, the ATO stated, in Practice Statement Law Administration PS LA 2014/3: *Simplifying transfer pricing record keeping*, that it would not allocate compliance resources or take other compliance action to examine transfer pricing records of taxpayers who have self-assessed as being eligible for one or more of the simplified record keeping options.

The updates made to the December 2014 online guide have come about from a broader ATO project on developing "safe harbours", which commenced in 2015. The safe harbour project is meant to develop a range of different measures designed to help ease the compliance burden on taxpayers.

Recap on December 2014 online guide

The December 2014 guide introduced 4 different options (**the original options**) under which eligible taxpayers could avail themselves of the simplified transfer pricing record keeping concession as follows:

- Small business taxpayers – aggregated turnover of less than $25 million;
- Distributors – aggregate turnover of less than $50 million;
- Intra-group Services – less than $1 million or less than 15% of aggregated expenses/revenue; and
- Low level inbound loans – combined cross-border loan balance of $50 million or less.

In order to be eligible to avail themselves of any of the original options, taxpayers are required to satisfy 3 key conditions (**the 3 general conditions**):

1. Have not derived sustained losses;
2. Have no dealings with entities in specified countries; and
3. Have not undergone a restructure in the relevant income year.

In addition to the 3 general conditions common to all 4 options, each of the original options has its own specific eligibility criteria and taxpayers are still required to self-assess their compliance with the Australian transfer pricing rules in order to avail themselves of any of the options.

Importantly, the 3 general conditions did not form part of the eligibility criteria for the ATO's

previous administrative practices for Intra-group Services under TR 1999/1. Consequently, because many businesses that had long relied on the previous ATO administrative practices for Intra-group under the new simplified record-keeping concession, this was viewed by many practitioners and taxpayers to be a backward step on the part of the ATO.

The new options in detail

Materiality

One of the most welcome changes to the simplified transfer pricing record keeping regime is the introduction of a simplification option based on the relative materiality of a taxpayer's IRPDs. In addition to not having IRPDs with specified countries and self-assessing compliance with Australia's transfer pricing rules, in order to be eligible for the Materiality option, the relevant taxpayer will need to be able to show that:

- its total IRPDs (expense or revenue) represent less than or equal to 2.5% of total turnover for the Australian economic group; and
- it does not have IRPDs involving royalties, licence fees or R&D arrangements.

Management and administration services

The update to the guide has also introduced a simplification option for management and administrative services (**G&A Services**). In addition to not having IRPDs with specified countries and self-assessing compliance with Australia's transfer pricing rules, in order to be eligible for the G&A Services option, the relevant taxpayer will need to be able to demonstrate that:

- its G&A Services (sales and expenses) are not more than 50% of the total IRPDs of the taxpayer's Australian economic group; and
- it has a mark-up on costs of the relevant services of either:
    - 5% or less for services received; and
    - 5% or more for services provided.

For the purpose of determining whether a particular service is considered G&A Services, a definition of management and administrative services has been included in the online guide which includes services that:

- involve or relate to the control, facilitation and monitoring of the business' human resources (staffing) and financial resources (assets); or
- relate to administering the business' day to day operations including:
    - Back office services;
    - Administrative services associated with employee share-based plans/recharge amounts; or
    - Accounting services.

However, the definition specifically excludes activities integral to financing, marketing or production.

Technical services

Additionally, the update to the guide has also introduced a simplification option for technical services (**Tech Services**). In addition to not having IRPDs with specified countries and self-assessing compliance with Australia's transfer pricing rules, in order to be eligible for the Tech Services option, the relevant taxpayer will need to be able to show that:

- its tech services (sales and expenses) are not more than 50% of the total IRPDs of the taxpayer's Australian economic group; and
- it has a mark-up on costs of the relevant services of either:
    - 10% or less for services received; and
    - 10% or more for services provided.

For the purpose of determining whether a particular service is considered Tech Services, a definition of technical services has been included in the online guide and this definition includes advice and/or assistance or support provided by persons with relevant technical expertise for activities associated with engineering, architecture and industrial design.

However, the definition specifically excludes advice or assistance associated with:

- the use of IP, know-how, processes, systems or other like intangibles or rights;
- the provision or acquisition of goods, commodities, other services (including financial services) or financial accommodation; and
- the provision or acquisition of marketing or other activities associated with engagement with customers or potential customers.

Clarification of relevant "costs" for services simplification options

The ATO has included a definition of "cost" in the updated online guide for use in applying/assessing eligibility for the simplification options for services (ie Intra-group Services, G&A Services and Tech Services) which state that "costs" should reflect all relevant costs, both direct and indirect, associated with these services.

Additional guidance has also been provided in relation to "pass through costs" (costs incurred where the service provider merely acts an agent facilitating the provision of the services by third party providers, thereby not actually providing the services itself but acting as an intermediary), clarifying that these costs should not be included in the "cost" element marked-up to calculate the service fees.

Areas of remaining uncertainty

Taxpayers with IP use arrangements for which no consideration is recognised

In our experience, many Australian owned groups expanding into overseas markets often make their brands, trademarks and information systems available to overseas related parties without recognising a specific charge to the overseas subsidiaries for their use of this IP.

It may be the case that consideration for the use of such IP is already factored into the price of tangible goods sold to the subsidiaries for re-sale in their local markets. Alternatively, it may be the case that the offshore subsidiaries are not deriving any additional incremental value from the use of such IP in their local markets and, therefore, from the perspective of the overseas' tax authorities, a charge for the use of such IP may not be justified.

Notwithstanding that there is no consideration explicitly recognised under such IP use arrangements, based on the fact that the definition of IRPD in the online guide makes no reference to consideration actually being recognised, it is unclear whether taxpayers with these types of IP use arrangements would be considered to satisfy all the criteria for either the materiality or the 3 different services options.

Technical services involving know-how

Other than referring back to the guidance in the old Taxation Ruling IT 2660 (which is now over 25 years old!), there is very little information for taxpayers to use when attempting to draw the distinction between "advice and/or assistance or support provided by persons with relevant technical expertise for activities associated with engineering, architecture and industrial design" and "advice or assistance associated with the use of know-how" - which are the word-for-word explanations provided in the online guide.

Ultimately, it is a matter of attempting to draw a distinction between "technical expertise" and "know-how", something that cannot be easily done - as evidenced by the overlapping definitions of the 2 terms found in most dictionaries. For example, thefreedictionary.com defines *know-how* as, inter-alia: "knowledge of how to do something; expertise"; and defines *expertise* as: "skill or knowledge in a particular area". In the absence of any clear guidance on the issue, what is a simple taxpayer to do?

Use by taxpayers with Substituted Accounting Periods

The simplification options for the Materiality, G&A Services and Tech Services options were introduced for 3 consecutive income years commencing from 1 July 2015. It remains unclear how these guidelines will apply to taxpayers that have adopted a Substituted Accounting Period (**SAP**). For example, for taxpayers that have SAPs which commenced 1 April 2015, will the 3 new simplification options be available to them for the entire income year or only the 9 months commencing from 1 July 2015?

General ambiguity

It may also be worth noting that the eligibility criteria for the Materiality option uses the words "expense or revenue" while the G&A and Tech Services options use the words "sales and expenses" for defining their respective IRPD ratio thresholds. It is unclear whether this was an intentional distinction or whether the 2 different descriptions can be regarded as inter-changeable.

Conclusion

Taxpayers should review their transfer pricing arrangements to determine whether they are eligible for the new options under the simplified transfer pricing record keeping regime.

In addition, taxpayers need to continue to carefully assess their eligibility for the simplified record keeping options on an annual basis to ensure that they do not fall afoul of any of the exclusions for the option they are seeking to apply.

Return to top

ASIAN TAX AND TRADE NEWS AND UPDATES

SINGAPORE

[2]. PUBLIC FEEDBACK SOUGHT ON BUDGET 2016

The Ministry of Finance (MOF) has announced it is seeking views and suggestions from all Singaporeans in preparation for Budget 2016. The Budget will be presented by Finance Minister Heng Swee Keat in Parliament on Thursday, 24 March 2016.

MOF has also launched the Budget 2016 website (www.singaporebudget.gov.sg), through which the public can access the latest updates on Budget 2016, as well as general information on the Singapore national budget process.

Starting from Monday, 1 February 2016, interested contributors can visit the REACH Pre-Budget 2016 microsite (www.reach.gov.sg/Budget2016) to submit their views online. The Budget feedback exercise will close on Friday, 26 February 2016.

Pre-budget listening points, conversations, and Q&A sessions will be held across Singapore from 17 to 22 February 2016.

Return to top

[3]. INDIVIDUAL TAX FILING REQUIREMENTS FOR FREQUENT BUSINESS TRAVELLERS

Generally, an employer is required to notify IRAS by filing the Form IR21 (Notification of a noncitizen employee's cessation of employment or departure from Singapore) for its employee who is neither a Singapore citizen nor Singapore Permanent Resident (SPR) (under immigration rules) or is an SPR who is leaving Singapore permanently (including on overseas posting for a period of more than three months) on cessation of employment in Singapore, at least one month before the expected date of cessation of employment or departure from Singapore, whichever is earlier.

In a recent newsletter, Deloitte explained that, in view of the practical issues faced by employers in meeting the tax clearance filing timelines for foreign employees who have employment bases outside Singapore (ie exercising employment outside of Singapore) but are required to make frequent business trips to Singapore (ie FBTs), IRAS has clarified the timeline for the filing of the tax clearance returns for the FBTs.

For example, where the work has ended and the FBT will not be making further business trips to

Singapore [with or without work pass obtained], submission of the return is required 2 months from the date of the last business visit. This tax clearance filing timeline (and the others noted by Deloitte in its newsletter) apply to FBTs who have exercised employment in Singapore for more than 60 days in the calendar year.

On a related matter, Deloitte said IRAS has published an acceptable rate of S$141 per day for per diem allowance given to FBTs travelling to Singapore for business trips on or after 1 January 2016, which will be tax exempt.

Return to top

[4]. INDIVIDUAL TAX FILING REQUIREMENTS FOR FREQUENT BUSINESS TRAVELLERS

Singapore is cooperating closely with the relevant authorities, including in Malaysia, Switzerland and the United States, in connection with investigations into possible money laundering and other offences carried out in Singapore, *The Business Times* reported.

"We have responded to all foreign requests for information and have requested information from relevant counterparts to aid in our investigations," the report said, quoting the Commercial Affairs Department (CAD) and the Monetary Authority of Singapore (MAS).

According to *Bernama*, the report said both CAD and MAS issued a joint statement on 1 February 2016 in response to 1Malaysia Development Bhd (1MDB) related queries.

Return to top

PHILIPPINES

[5]. CIR LOSES APPEAL RE VAT, DEFICIENCY INCOME AND WITHHOLDING TAX ASSESSMENTS – *STAEDTLER* CASE

The Court of Tax Appeals has cancelled a VAT deficiency notice and withholding tax deficiency against a taxpayer: *CIR v Staedtler (Philippines) Inc*, CTA Case No 8431, 28 January 2016.

The taxpayer is engaged in the wholesale and importation of Staedtler products in the Philippines. Its books were audited and assessments for deficiency income tax, VAT and expanded withholding tax were issued.

The CIR had the appealed against the decision dated 20 January 2015 and Resolution dated 4 May 2015 of the Court of Tax Appeal's (CTA) First Division in CTA Case No. 8431, which cancelled and withdrew her VAT assessment and modified her deficiency income tax and expanded withholding tax assessment for the taxable year 2007 against the taxpayer, Staedtler
(Philippines), Inc.

After careful consideration, the Court of Tax Appeals said it found no merit in CIR's appeal. The Court said it found "no cogent reason or justification to disturb the conclusions reached by the CTA First Division" and rejected the CIR's appeal.

Return to top

MALAYSIA

[6]. TAX AMNESTY ENABLES EVADERS TO AVOID PENALTIES

The special consideration on relaxation of the penalty on tax evaders will enable them to avoid

penalties by up to 300% of the tax amount, said Deputy Finance Minister Datuk Chua Tee Yong.

According to the *Malaysia Gazette*, he said the Government agreed to relax the imposition of penalties to encourage them to come forward to declare their past year's income and settle tax arrears before 31 December this year

"There will be further updates on the details for the tax amnesty," he said in a statement on 29 January 2016, adding, he would hold discussions with the Inland Revenue Board (IRB) soon to develop the mechanism.

Return to top

[7]. CUSTOMS UPDATES GST GUIDE ON PROPERTY MANAGEMENT

Royal Malaysian Customs has updated its GST guide (revised as at 27 January 2016) on Property Management: Joint Management Bodies (JMBs) & Management Corporations (MCs).

The revised guide says that, for GST purposes, the following are subject to GST:

- any provision of management services by the provider of the property management to the commercial parcel owner; and
- any provision of management services by the provider of the property management to any person other than residential parcel owner in the residential.

However, provision of management and maintenance services by the provider of the property management to the residential parcel owner in the residential building is exempted from GST as provided for by the *Goods and Services Tax (Exempt Supply) Order 2014*.

Where a JMB or MC is a mixed supplier (making both exempt and standard rate supplies), the GST legislation requires them to register if their annual turnover involving taxable supplies exceeds the GST threshold in the past 12 months or within the future 12 months. Any consideration received by the registered JMBs or MCs on the taxable supplied of goods or services are subject to GST.

Hence, for commercial property, the guide says contributions from such parcel owners in the form of maintenance fees are subject to GST.

Return to top

[8]. MALAYSIA-EU FTA TO BE FINALISED SOON

The Free Trade Agreement (FTA) between Malaysia and the European Union (EU) is expected to be finalised in the first quarter of this year, Second International Trade and Industry Minister Datuk Seri Ong Ka Chuan has said.

He said Malaysia is stepping up negotiations with the EU and hopes to get preferential market access to the EU, spurring the economic growth of both sides, *Bernama reported*.

"Vietnam has concluded negotiations with the EU and will likely sign an agreement this year. Malaysia is still at the negotiation stage with the EU, and we hope to get access to new markets and export more local goods."

Return to top

[9]. SWISS SEEK MALAYSIAN HELP PROBING ALLEGED US$4 BILLION FINANCIAL MISAPPROPRIATIONS

Switzerland's chief prosecutor said on 29 January 2016 that he had formally asked Malaysia for help with his probe into possible violations of Swiss law by the state-owned fund 1Malaysia Development Berhad (1MDB), saying suspected misappropriations amounted to about US$4 billion.

According to Reuters, the office of Swiss Attorney General Michael Lauber said the request pertained to possible violations of Swiss laws related to bribery of foreign officials, misconduct in public office, money laundering and criminal mismanagement at 1MDB.

1MDB, whose advisory board is chaired by Malaysia's Prime Minister Najib Razak, was being examined by Malaysian authorities investigating accusations of financial mismanagement and graft. Reuters said the fund has been dogged by controversy over its US$11 billion debt and alleged financial mismanagement.

The Swiss statement said Lauber's investigation had already "revealed serious indications that funds have been misappropriated from Malaysian state companies." Those funds "would have been earmarked for investment in economic and social development projects in Malaysia," the Swiss official said.

The Swiss prosecutor said the misappropriated amount was suspected to be around US$4 billion. He said a small portion of the money had been transferred to accounts held in Switzerland by former Malaysian public officials and current and former public officials from the United Arab Emirates.

Return to top

THAILAND

[10]. NEW DTA BETWEEN THAILAND AND INDIA

As reported at 2015 ATB 53 [23], a new double tax agreement (DTA) between Thailand and India (replacing the previous treaty) was agreed to on 1 December 2015. KPMG says it is anticipated that the new income tax treaty would enter into force in Thailand in January 2017, but this is not official.

The DTA includes various updates and clarifications to the permanent establishment (PE) article. Exceptions to the creation of PEs have now been restricted KPMG said. Also, a PE would now arise when a combination of various activities (such as storage, display of goods, purchasing of goods) is not of a preparatory or auxiliary character in relation to the business as a whole.

Another provision allows capital gains on the disposal of shares in a “property rich” company to be taxed in the country where the property is located. The new treaty includes a comprehensive exchange of information article. A limitation of benefits article is also introduced that confirms each contracting state’s right to apply, without limitations, its domestic law and measures concerning tax avoidance or evasion.

Concerning withholding taxes, the new treaty provides for the following:

- Dividends - withholding tax rate reduced to 10% (from 15% / 20%).
- Interest - withholding tax rate of 10%, but 0% when the interest is beneficially owned by the

government, a political subdivision, local authority, or certain banks or institutions.
- Royalties - withholding tax rate reduced to 10% (from 15%).

KPMG says the new DTA also has a far more comprehensive exchange of information article giving the contracting states far greater powers to gather information from the other state. Thailand or India, as the case may be, would not be permitted to refuse to supply the information simply because it has no domestic interest in such information or the information is held by a bank, other financial institution, nominee, person acting in an agency or a fiduciary capacity.

Return to top

VIETNAM

[11]. FULL TEXT OF EU-VIETNAM FREE TRADE AGREEMENT PUBLISHED

On 1 February 2016, the European Commission published the text of the Free Trade Agreement (FTA) between the EU and Vietnam, following the conclusion of the negotiating process in December 2015.

In line with its transparency commitments, the Commission makes the text of trade agreements available to the public as soon as the talks are finalised. This is designed to allow all interested stakeholders to become familiar with its content well in advance of the debate in the EU Council and the Parliament.

According to the usual procedure, the Commission said the text will now be subject to a legal review to verify its consistency and ensure that all the provisions are formulated in a legally-sound way. It will then be translated into all EU languages before being presented to the Council and the European Parliament for ratification.

"I am glad that we now publish this agreement in line with our strong commitment to a transparent trade policy" said EU Trade Commissioner Cecilia Malmström. "When approved," she continued "the agreement will unlock a market with huge potential for EU firms. Vietnam is a fast-growing economy of more than 90 million consumers with a growing middle class and a young and dynamic workforce. Its market offers numerous opportunities for the EU's agricultural, industrial and services exports. The agreement will also help trigger a new wave of high quality investment in both directions, supported by our new investment dispute resolution system with an appeal mechanism."

The Vietnam agreement includes all of the key provisions of the new Investment Court System for EU trade and investment negotiations proposed by the European Commission.

In addition to creating new opportunities for EU firms, the agreement aims to support Vietnam's transition towards a more competitive and more sustainable economy.

Return to top

[12]. CAR IMPORTS DROP AFTER LUXURY TAX INCREASE

Vietnam’s car imports took a sharp fall following a new tax regulation that took effect early this year.

Luxury tax, new tax rule which calculates tax based on a car’s retail price rather than its cost, insurance freight (CIF) before duties and mark-ups, may have triggered a reaction from car importers based on figures by the General Statistics Office.

Car imports in January went down by 50% from December while their value declined by nearly 56%. Since the luxury tax took effect, car importers were forced to increase prices by 2 to 13%, reports said.

Luxury tax on cars range between 15 to 60% depending on the vehicle's seating capacity and engine size. Last year, Vietnam imported 125,600 completely-built units worth $2.99 billion. (*Thanh Nien News*)

Return to top

CHINA

[13]. TAX BREAKS FOR SMALL BUSINESSES REACH 100 BILLION YUAN

The State Council has advised that data released by the State Administration of Taxation (SAT) shows that small and micro businesses enjoyed about 100 billion yuan (US$15.2 billion) in tax breaks in 2015, thanks to preferable tax policies.

In recent years, tax policies to support the development of small and micro businesses have been expanding. The tax exemption threshold for monthly sales or business volume of small and micro businesses was raised to 30,000 yuan, up from the 20,000 yuan previously. In addition, the tax reduction threshold, which cuts half of taxes for less profitable small and micro businesses, was raised from 30,000 yuan to 300,000 yuan.

Meanwhile, preferable tax policies for technology innovation are being implemented too.

In 2015, tax breaks for 31,000 high-tech enterprises reached more than 100 billion yuan; reduction for software and integrated circuit enterprises amounted to more than 30 billion yuan.

Return to top

[14]. COMPANIES GET MUCH NEEDED TAX RELIEF

China's corporate tax reform program seeks to replace sales tax with VAT, thereby removing duplication of taxes and easing financial burden on enterprises. Under the new system, companies no longer need to pay sales tax based on their revenue. Analysts said sectors where input taxes are high, including construction, real estate and consumer services, will benefit the most.

A report from GF Securities Co Ltd said land is a large part of property developers' costs and impacts on input tax. But, under the new system, profit margin may widen greatly if the land cost is regarded as part of input tax.

Even for developers with deductible taxes on other cost items such as decoration and installation projects, profit margin may widen after the reform, the report said.

China.org also reported that financial services, such as banks and brokerages, will also feel the impact of the fiscal reform, although not in the immediate term.

Based on the analysis of a report from Beijing Gao Hua Securities, banks' and brokerages' profits before tax are estimated to narrow between 0.5% and 1.7% as a large part of their current sales revenue is not regarded a deductible input item.

However, in the longer term, players whose personal operating expenses are higher than peers, may benefit more from the reform as these costs may be defined as deductible items.

Return to top

[15]. MUTUAL ASSISTANCE IN TAX MATTERS CONVENTION HAS ENTERED INTO FORCE FOR CHINA

On 1 February 2016, the OECD-Council of Europe Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol entered into force for China. The Convention, signed by China on 27 August 2013, generally applies from 1 January 2017. However, it may apply for earlier periods between China and another signatory if agreed to, and applies in relation to any period regarding criminal matters.

Return to top

[16]. TAX EXEMPTION EXPANDED FOR CERTAIN GOVERNMENTAL FUNDS

On 29 January 2016, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) issued the Notice Regarding Expanding the Exemption Scope of Relevant Governmental Funds (*Cai Shui [2016] No. 12*).

The Notice expands the exemption scope of educational surcharges, local educational surcharges, and water conservancy construction funds from existing obligors with a monthly sales amount or turnover of 30,000 yuan or less if tax payment is made on a monthly basis (with a quarterly sales amount or turnover of 90,000 yuan or less if tax payment is made on a quarterly basis), to obligors with a monthly sales amount or turnover of 100,000 yuan or less if tax payment is made on a monthly basis (with a quarterly sales amount or turnover of 300,000 yuan or less if tax payment is made on a quarterly basis).

The Notice came into effect on 1 February 2016.

Return to top

[17]. MOF AND SAT DEFINE PREFERENTIAL TAX POLICIES FOR PUBLIC RENTAL HOUSING

On 30 December 2015, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) issued the Notice Regarding Preferential Tax Policies for Public Rental Housing (*Cai Shui [2015] No. 139*), effective from 1 January 2016 to 31 December 2018.

According to the Notice, the land used during the construction of public rental housing and the land occupied by the built-up public rental housing will be exempted from urban land use tax; the operation and management organizations of public rental housing which purchased housing as public rental housing will be exempted from deed tax and stamp tax; both parties to the lease of public rental housing will be exempted from stamp tax involved in the tenancy agreement signed by both parties.

Return to top

[18]. EMPLOYEE VIEWS OF CORPORATE TAX AGGRESSIVENESS IN CHINA

In a recent article in the *eJournal of Tax Research* [University of NSW, Sydney], the authors (Grantley Taylor – Curtin University, Ying Han Fan - Curtin University and Yan Yan Tan - Zhongnan University of Economics and Law) examined the association between social and political relationships, or

interpersonal bonds (*guanxi*) and audit independence and ethical judgments of corporate tax aggressiveness in Chinese firms that operate in an international context.

Guanxi among Chinese entrepreneurs can have a profound influence on business outcomes (Sharkey, 2008; Tu et al., 2013). In China, *guanxi*, or the establishment of relationships or connections with business partners, is considered necessary to acquire resources, obtain approvals or bureaucratic privileges, facilitate the achievement of business outcomes, or reduce the risk that those outcomes will not be achieved (Hwang et al., 2009; Liu et al., 2011).

The authors examined the association between *guanxi* and audit independence and ethical judgments of corporate tax aggressiveness in Chinese firms that operate in an international context. An evaluation of *guanxi* is important, they said, as relations established between management and auditors and between management and government officials such as tax officials may have a bearing on management's propensity and opportunity to reduce the corporate taxes payable.

Based on their survey, the authors found that 2 types of *guanxi*, favour-seeking *guanxi* and rent-seeking *guanxi*, are significantly associated with ethical judgments of tax aggressiveness. Perceptions of audit independence in-fact are significantly negatively associated with these judgments, whereas audit independence in-appearance is positively associated with them.

Further, the authors said significantly positive relations exist between perceptions that tax-aggressive activities are good for the firm and its shareholders and both favour-seeking *guanxi* and stronger client-auditor relations.

This study contributes to the literature on the importance of *guanxi* in influencing managerial activities, opportunism and business outcomes. It also empirically demonstrates that audit independence and the client–auditor relationship play a critical role in influencing managerial behaviour, the authors say.

Return to top

[19]. CHINA MAY DIGITISE RMB – WOULD HELP COMBAT TAX EVASION

China's central bank, the People's Bank of China (PBOC), is considering the possibility of issuing a digital currency. It believes that the adoption of digital currency could reduce the cost of paper notes; increase the transparency of transactions in a bid to combat money laundering and tax evasion; and intensify the control of the central bank over the currency's supply and circulation.

China.org reported that the issuance of Chinese digital currency by the PBOC would reflect the real value of remnibi. The report also stated that with the issuance of the digital currency, the RMB may be considered more credible by the international community owing to easy access of verifying accounting records.

The PBOC said that with the digital currency, connectivity will be established with other payment means to give wider coverage and lower costs.

Return to top

[20]. CHINA STILL ATTRACTIVE TO FOREIGN INVESTORS: STATE COUNCIL

The State Council says a UN report shows that foreign direct investment in China in 2015 reached US$136 billion with a 6% growth, ranking in the world's top 3. The figures come from the latest

report from the United Nations Conference on Trade and Development proved.

Return to top

[21]. FAMILIES OF EXPATS CAN STAY LONGER IN BEIJING

Foreign family members of Chinese citizens will be eligible for a 2-year residency permit in Beijing based on a family visit visa, according to the Beijing Municipal Public Security Bureau. The State Council said the Bureau announced a new policy on 26 January 2016 that extends by one year the time allowed under the previous policy. The 2-year permits are renewable.

Family members of a Chinese citizen—including spouses, parents, spouse's parents or children, siblings, grandparents, grandchildren and spouses of the children—are now allowed to live in Beijing for 2 years. Formerly, they had to go to the Department of Entry and Exit for an annual renewal.

The policy affects only people whose residency permits are based on a family visit visa. It does not change the time for foreigners living and working in Beijing under a work visa.

Under the new policy, anyone applying for renewal of a residency permit will not be required to hand in certain papers, such as a marriage certificate, to prove a relationship with a Chinese citizen.

Return to top

[22]. NEW RULE TO ALLOW 6 DAYS WITHOUT VISA

China's first cross-region visa-free transit policy will took effect on 30 January 2016 in the Yangtze River Delta region, according to a statement by the Ministry of Public Security.

The policy gives 144 hours—6 days—with no visa requirement to foreign tourists or businesspeople from 51 countries who pass through Jiangsu province, Zhejiang province or Shanghai.

Information on the State Council website says that to qualify, a passenger must hold valid international travel documents and booked tickets with confirmed dates and destinations.

Since 2013, Shanghai, Hangzhou, capital of Zhejiang, and Nanjing, capital of Jiangsu, have had a 72-hour visa-free policy to enable tourists to stop and stay without a visa, but only if they entered one of the cities via an airport. Now the entry points have been expanded to include ports and railway stations.

Return to top

HONG KONG

[23]. STAMP DUTY ON MUTUAL RECOGNITION OF FUNDS BETWEEN MAINLAND AND HONG KONG

The IRD has posted on its website a number of FAQs dealing with the mutual recognition of funds (MRF) between Mainland and Hong Kong. Through the MRF, the China Securities Regulatory Commission (CSRC) and the Securities and Futures Commission (SFC) allow Mainland and Hong Kong funds that meet the eligibility requirements to follow streamlined procedures to obtain authorisation or approval for offering to retail investors in each other's market.

Some of the FAQs cover:

- The sale and purchase in the Mainland of China of units of a recognised Hong Kong fund under the MRF scheme are subject to stamp duty in Hong Kong under s 2(1) of the Stamp Duty Ordinance (SDO).
- However, the sale and purchase in Hong Kong of units of a recognised Mainland fund under the MRF scheme is not subject to stamp duty in Hong Kong as units in a recognised Mainland fund are not Hong Kong stocks.
- Unless specifically exempted under the SDO, any non-trade transfers of units of a recognised Hong Kong fund will be deemed to be sale and purchase of the relevant securities under s 19(1E)(a) of the SDO. Non-trade transfers of units of a recognised Hong Kong fund generally take place in the following circumstances:
    - succession;
    - divorce;
    - dissolution, liquidation or winding-up of any company or corporation;
    - donation to a charitable foundation;
    - assistance in enforcing proceedings or action taken by any court, prosecutor or law enforcement agency; and
    - any other transfers which may be permitted by the competent authorities.
- For the purpose of calculating stamp duty payable, a person is required to provide supporting documents indicating the net asset value of the recognised Hong Kong fund which is close to the date of transfers.

Other FAQs were:

- What are the stamping procedures for sale and purchase of units of a recognized Hong Kong fund under the MRF scheme?
- What are the stamping procedures for non-trade transfers of units of a recognized Hong Kong fund under the MRF scheme?
- If I have changed the nominee or registered holder of my units of the recognized Hong Kong fund under the MRF scheme, such as fund manager or distributor of the fund, through execution of an instrument of transfer, is the instrument of transfer subject to stamp duty in Hong Kong?
- If the transfers of units of a recognized Hong Kong fund under the MRF scheme are effected in the Mainland of China, how should the stamping request be lodged?
- How should Hong Kong managers of a recognized Hong Kong fund assist Mainland investors to lodge the stamping request?
- What are the consequences of not paying stamp duty on the transfers of units of a recognized Hong Kong fund under the MRF scheme?

Return to top

[24]. TEMPORARY SUSPENSION OF TAX RETURN FILING VIA ETAX

The IRD has advised that to facilitate a system update, the Internet filing service for Tax Return - Individuals will be temporarily suspended from 30 March 2016.

Any partially completed return previously saved will also be deleted. The IRD asks taxpayers to complete their eTAX filing ON OR BEFORE 29 March 2016 or they will have to file their tax return in paper form.

Return to top

[25]. DTA BETWEEN AUSTRALIA AND HONG KONG TO BE NEGOTIATED

Officials from Australia and Hong have reportedly agreed to begin negotiations for a double tax agreement between the 2 countries. Any resulting treaty would be the first of its kind between the 2 jurisdictions, and will need to be finalised, signed and ratified in each country before entering into force.

Return to top

[26]. TIEA BETWEEN HONG KONG AND POLAND UNDER NEGOTIATION

According to a recent update from the Hong Kong Inland Revenue Department, negotiations are underway for a tax information exchange agreement (TIEA) with Poland. Any resulting agreement will be the first of its kind between the 2 jurisdictions, and must be finalised, signed and ratified before entering into force.

Hong Kong is also negotiating other TIEAs with Argentina and the Philippines.

Return to top

[27]. COMPLAINTS ABOUT DELAYS IN STAMP DUTY ADJUDICATION

It is understood there have been complaints about the Inland Revenue Department (IRD) taking a disproportionately long time to process requests for adjudication of stamp duty (requests), causing inconvenience to both the legal profession and the parties involved in the relevant transactions. The delay has become particularly serious after the introduction of Buyer's Stamp Duty in October 2012 and doubled ad valorem stamp duty in February 2013 for property transactions by the authorities.

In response, the Secretary for Financial Services and the Treasury said the IRD is committed to providing efficient and effective services to the taxpayers. All along, IRD has been processing the requests for adjudication of stamp duty (adjudication request) in accordance with the relevant provisions of the Stamp Duty Ordinance (Cap. 117) (SDO). In handling the adjudication requests and making its determination, IRD will consider all circumstances of the case, including the original instrument as well as relevant supporting documents and information submitted by the stamp duty payers.

To provide clarifications to stamp duty payers on certain important issues and facilitate their timely submission of relevant supporting documents, IRD will also issue checklists on points-to-note in future to assist the stamp duty payers concerned.

Return to top

[28]. INVESTHK ASSISTS RECORD NUMBER OF OVERSEAS AND MAINLAND COMPANIES TO SET UP OR EXPAND IN HONG KONG

Invest Hong Kong (InvestHK) has announced that the department assisted 375 overseas and Mainland companies to set up or expand in Hong Kong in 2015. They came from 36 economies. This number represents an all-time high and a year-on-year increase of 5.6%.

Mainland China continued to lead with a total of 78 companies, followed by the US with 49 companies, the UK (36), Japan (31) and France (20). For the first time, InvestHK helped 2 companies from Latvia and Seychelles to set up in Hong Kong. They are a bank representative office and a food

and beverage trading and manufacturing company respectively.

In terms of emerging subsectors, the department assisted a growing number of companies in the Internet of Things and financial technology industries (a total of 19 in 2015 compared with nine in 2014).

InvestHK's Director-General of Investment Promotion, Dr Simon Galpin, said he was delighted to see the increase in the number of companies assisted in 2015.

"2015 was another record year for InvestHK in terms of the number of companies assisted. Despite ongoing challenges in the global economy, Hong Kong continues to attract overseas and Mainland investors because of its enduring advantages and emerging business opportunities," Dr Galpin said.

"In the year ahead, we will continue to identify investors from key sectors and markets. Our targets include companies ranging from entrepreneur-led ventures to multinationals that plan to set up or expand in our city," he added.

InvestHK is the department of the Hong Kong Special Administrative Region Government established in July 2000 to attract foreign direct investment and support overseas and Mainland businesses to set up or expand in Hong Kong. It provides free advice and customised services to help businesses succeed in Hong Kong's economy.

Return to top

INDIA

[29]. RESOLUTION OF MORE THAN 100 CASES OF TRANSFER PRICING DISPUTES WITH USA

One of the significant steps taken by Central Board of Direct Taxes (CBDT) to boost investment sentiment among MNCs is the landmark Framework Agreement signed with the Revenue Authorities of the USA in January 2015. This agreement was finalised under the Mutual Agreement Procedure (MAP) provision contained in the India-USA Double Tax Agreement (DTA).

The CBDT said the Agreement seeks to resolve about 200 past transfer pricing disputes between the 2 countries in the Information Technology (Software Development) Services [ITS] and Information Technology enabled Services [ITeS] segments. More than 100 cases have already been resolved and some more are expected to be resolved before the end of this fiscal.

Prior to resolution of disputes under the Framework Agreement, the US bilateral APA programme was closed to India. The CBDT said the success of the framework Agreement in a short period of one year has led to the US Revenue Authorities opening up their bilateral APA programme to India. The US is expected to begin accepting bilateral APA applications shortly.

The MAP programmes with other countries like Japan and UK are also progressing well with regular meetings and resolution of past disputes. The CBDT said it is confident that a combination of a robust APA programme and a streamlined MAP programme would be helpful in creating an environment of tax certainty and encourage MNCs to do business in India.

Return to top

[30]. CBDT SIGNS 2 NEW BILATERAL APAS WITH INDIA ENTITIES OF UK-BASED MNC

The Central Board of Direct Taxes (CBDT) has advised that it entered into 2 bilateral Advance Pricing Agreements (APAs) with United Kingdom on 29 January 2016. With this signing, the CBDT has concluded 3 bilateral APAs the first one being a bilateral APA signed with Japan in December 2014.

The 2 new bilateral APAs were signed with 2 Indian group entities of a UK based Multi-National Company (MNC). The APAs were entered into soon after the Competent Authorities of India and United Kingdom finalised the terms of the bilateral arrangement under the Mutual Agreement Procedure (MAP) process contained in the India-UK DTA.

The APAs cover the period 2013-14 to 2017-18 and also have a "Rollback" provision for 2 years (2011-12 and 2012-13). Transfer pricing disputes on the same transaction were recently resolved under MAP for each of these 2 companies for the years 2006-07 to 2010-11. With the signing of the bilateral APAs, the CBDT said the 2 Indian companies have been provided with tax certainty for 12 years each (5 years under MAP and 7 years under APA).

The CBDT said the 2 APAs are also significant because they address the issues of payment of management and service charges and payment of royalty. These transactions generally face prolonged and multi-layered transfer pricing disputes.

With this signing, the CBDT has so far signed 41 APAs out of which 38 are unilateral and 3 are bilateral.

Return to top

[31]. FINANCE MINISTER ENCOURAGES OPPOSITION TO SUPPORT GST

Indian Finance Minister Arun Jaitley said on 30 January 2016 that he hoped the opposition Congress party will come round to backing India's proposed GST that it has opposed despite being the first to propose the reform, Reuters reported.

"I hope they are flexible and see the rationale behind passing GST," Jaitley said in an interview at the Economic Times Global Business Summit.

Jaitley reiterated reassurances that India would not pursue foreign companies with new retroactive tax claims, adding that he would like to see the few remaining disputes resolved "as expeditiously as possible."

Return to top

[32]. PAYMENTS FOR SOFTWARE NOT ROYALTIES IF FOR RESALE – *M TECH INDIA P LTD* CASE

The Delhi High Court has held that while consideration paid to acquire the right to use software is assessable as "royalty", payments made for purchase of software as a product is not for use or the right to use the software and was not assessable as "royalty": *Pr. CIT v M Tech India P. Ltd*.

The case involved the 2008-09 assessment year. The Assessee had entered into a "VAR Agreement" with Track Health Pty. Limited, Australia (THPL). The assessee was required to promote, market and sell the Products in accordance with a business plan. The Assessee was entitled to use the software and source codes for limited purposes to sell and promote the software for use by third parties; demonstrate the software to third parties; and to customise the software for the purposes of End Users. The agreement further contained a number of covenants to ensure that the Intellectual Property Rights in respect of the software, related material and source codes remains with THPL.

The Court said that a plain reading of the agreement indicated that the Assessee had been appointed for the purposes of reselling THPL's software. The AO held that the payment was assessable as "royalty" and that the assessee ought to have deducted tax at source. The CIT(A) and ITAT upheld the assessee's claim that the Assessee was engaged in the resale of software and the payments made by it to THPL and others were on account of purchases made by the Assessee. The Department appealed to the High Court.

The Court dismissed the appeal.

The Court was required to rule on whether payments for software intended for resale could be considered royalties. The case involved M Tech India (M Tech), which was involved in purchasing software from offshore vendors, making small customizations, and selling to Indian healthcare and hospitality companies.

In the year concerned, M Tech had value added seller agreements with several offshore vendors. Each vendor was paid for software purchased, and M Tech treated the amounts as deductible costs of goods sold. When assessing M Tech, the tax authorities determined that the payments for the software should instead be treated as royalty payments, and because M Tech did not withhold tax on the deemed royalties, the payments could not be deducted. M Tech appealed, and the case made its way to the High Court.

The Delhi High Court sided with M Tech. In coming to its decision, the Court evaluated the substance of the transactions. Since the intellectual property rights for the software remained with the vendors and the software was not purchased for M Tech's own use, the Court determined that the transactions were more similar to a purchase and resale of goods. Based on this and certain past cases, the Court held that payments for software in this case could not be considered royalty payments.

The Court said the Revenue's reliance on the decision of the Karnataka High Court in *CIT v. Samsung Electronics Co. Ltd* (2012) 345 ITR 494 was of no assistance.

Return to top

[33]. MINES MINISTRY PROPOSES SCRAPPING EXPORT TAX ON IRON ORE FROM GOA

India's mines ministry has written to the Finance Ministry to propose scrapping a 10% export duty on low-quality iron ore from Goa state, an official said, as miners urged the government to help boost sales amid a sharp fall in prices.

Mines Secretary Balvinder Kumar told Reuters he wrote to the Finance Ministry very recently, but they are yet to get back. Goa is known for low-grade ore used mainly by Chinese steel mills.

A Finance Ministry spokesman could not immediately be reached for comments, Reuters said.

Return to top

[34]. INDIA MOVING TO ELIMINATE "BAD" SUBSIDIES: PM

In a recent speech to the Economic Times Global Business Summit, Prime Minister Narendra Modi spoke about India's efforts to rationalise subsidies and to get rid of "bad" subsidies. He paid particular attention to subsidies for cooking gas, fertilizer and kerosene.

He also noted a curiosity that when a benefit is given to farmers or to the poor, experts and government officers normally call it a subsidy. However, if a benefit is given to industry or commerce, it is usually called an “incentive” or a “subvention”. The PM went on:

"We must ask ourselves whether this difference in language also reflects a difference in our attitude? Why is it that subsidies going to the well-off are portrayed in a positive manner? Let me give you an example. The total revenue loss from incentives to corporate tax payers was over Rs. 62,000 crores. Dividends and long term capital gains on shares traded in stock exchanges are totally exempt from income tax even though it is not the poor who earn them. Since it is exempt, it is not even counted in the Rs. 62,000 crores. Double Taxation avoidance treaties have in some cases resulted in double non-taxation. This also is not counted in the Rs. 62,000 crores. Yet these are rarely referred to by those who seek reduction of subsidies. Perhaps these are seen as incentives for investment. I wonder whether, if the fertiliser subsidy is re-named as 'incentive for agricultural production', some experts will view it differently.

I am not arguing that all subsidies are good. My point is that there cannot be any ideological position on such matters. We have to be pragmatic. We have to eliminate bad subsidies, whether or not they are called subsidies. But some subsidies may be necessary to protect the poor and the needy and give them a fair chance to succeed. Hence my aim is not to eliminate subsidies but to rationalize and target them."

Return to top

[35]. FINANCE MINISTER COULD SQUEEZE BUSINESS TO BALANCE BOOKS

Finance Minister Arun Jaitley wants to present a credible budget this month with realistic targets for tax revenues and asset sales, people involved in the process say, but businesses may end up picking up much of the tab.

Reuters said Jaitley is staring at a big revenue shortfall as India again misses an unrealistic target for raising cash from selling off state assets, while sliding commodity prices and exports have dented revenues.

Prime Minister Narendra Modi has questioned whether businesses should continue to benefit from tax "incentives" worth 624 billion rupees that he described as subsidies in all but name. "My aim is not to eliminate subsidies, but to rationalise and target them," Modi said in a keynote speech recently.

Those familiar with the budget process said Jaitley may pare tax breaks on capital investment, R&D, and projects in under-developed regions. As of now, the government is not considering raising its deficit target.

They declined to estimate how much those measures would raise, but one said they would more than offset revenue losses from cuts in India's corporate income tax announced a year ago.

Then, Jaitley promised to bring down the tax to 25% from 30% over 4 years, pruning exemptions as he goes. Reuters said businesses have hailed the promised tax cuts but they, and their advisers, say closing loopholes too aggressively would hamper Modi's "Make in India" drive to attract foreign investors and boost export industries.

"If Mr. Modi is talking about Make in India, it has to be the foreign multinational companies setting up manufacturing facilities in India and using it as an export hub like China," said Rahul Mitra, a tax partner at KPMG. "If you want to do that you can't wish away the necessary exemptions for exports."

Reuters said the statutory burden of all taxes on the typical Indian company is about 34%. That's relatively high by international standards, but tax breaks bring the effective rate down to 23%.

The corporate income tax breaks make up a relatively small part of US$80 billion in business giveaways, the lion's share of which comes from incentives on customs and excise duties.

Return to top

[36]. MANAGERIAL SERVICES NOT FTS UNDER INDIA-UK DTA – *CUMMINS LTD* CASE

The Authority for Advance Rulings (AAR) has held that managerial services rendered by a UK Co to an Indian Co, even if technical in nature, were not assessable as "fees for technical services" (FTS) under Article 13 of India-UK DTA if the services do not "make available" any skill, technical know-how etc: *In Re Cummins Limited*.

The applicant, Cummins Limited, UK is a company incorporated in the UK. Cummins Technologies India Limited (CTIL) is a company incorporated in India. CTIL is engaged in the business of manufacture and sale of turbochargers. CTIL purchases turbocharger components directly from third party in UK and US and in relation to such purchases, Cummins Limited provides supply management services vide Material Suppliers Management Service Agreement dated 7 December 2010. The agreement was effective from 1 July 2010. As per the agreement, CTIL pays supply management service fees calculated at 5% of the base prices from the suppliers.

The applicant sought a ruling on the question:

Based on the facts and circumstances of the case, whether the supply management service fees received by Cummins Limited, UK from CTIL pursuant to Material Suppliers Management Service Agreement dated 7 December 2010 between Cummins Limited and CTIL, is in the nature of "Fees for Technical Services" or "royalties" within the meaning of the term in Article 13 of the India-UK double tax agreement (DTA)? Is also queried whether the payments received by Cummins Limited were chargeable to income tax in India and if not, whether the provisions of ss 92 to 92F of the Income-tax Act relating to transfer pricing were applicable.

The AAR held that the objection of the Revenue that the agreement entered into by the applicant with CTIL was a scheme for tax avoidance was "without any merits". To Authority said that to say that the applicant had entered into contract with the Indian company with the main purpose to take advantage of India-UK DTA was factually incorrect.

The facts as stated by the applicant in the application show that the applicant maintains Global Cummins contract supply agreement with suppliers and is responsible for finalization of supplier prices to Cummins Turbo Technologies worldwide, including CTIL, from UK and US suppliers. There is no mandate for CTIL to source the components from the approved suppliers only and if CTIL finds a better pricing from an alternate supplier, it shall be free to source the component from them. It is incorrect to say that such arrangement has been done with the main purpose to avoid tax.

Therefore, the objection of the Revenue on this count fails.

As regards taxability of the Supply Management Services fees as FTS, the Authority said the agreement showed that the CTIL was working with the applicant only to ensure market competitive pricing from the suppliers. The AAR said the applicant was not imparting its technical knowledge and expertise to the Indian company based on which the Indian company will acquire such skills and will be able to make use of it in future. Therefore, the "make available" clause under India-UK DTA is not satisfied.

The AAR said it also recently analysed the concept of 'make available' in the case of *Measurement Technologies Ltd*. and concluded that the services in the nature of procurement services can never be classified as technical or consulting in nature and surely are not making available any technical knowledge, experience, know-how etc. "The facts of this [Cummins] case are also similar and there is no reason to take a different view".

As regards services being royalty and covered under Article 13(3), the AAR considered it must be said that the nature of services related to identification of products and competitive pricing cannot qualify as royalties under the provisions of Article 13 under India-UK DTA because it is not related with the use of, or the right to use any copyright, patent, trademark, design or modal, plan, secret formula or process etc.

In the result, the AAR decided that:

- The Supply Management Services fees received by the applicant are not in the nature of FTS or royalties under the India-UK DTA.
- In view of the fact that the applicant has no PE in India, the fees received are not taxable in India.

Return to top

[37]. INSTALLATION PROJECT NOT A PE UNDER INDIA-SINGAPORE DTA – *TIONG WOON* CASE

The Authority for Advance Rulings (AAR) has held that an installation project which does not last more than 183 days in a fiscal year is not a "Permanent Establishment" (PE) and the business profits are taxable only in Singapore under Article 7(1) of the India-Singapore DTA: *In Re Tiong Woon Project & Contracting (Pte) Limited*.

The Applicant is a Singapore-based company and a non-resident of India as per provisions of s 6(3) of the Income Tax Act, 1961. It is engaged in the business of heavy lifting and erection and installation of heavy equipments such as boilers, coke drums, fractionators, generators, chimneys, etc, for large projects at the project sites. It carries out its activities in many countries in Asia. The Applicant imported 2 cranes into India in November 2007. It completed the installation project, which is covered by Article 5.3 of the India-Singapore DTA.

The applicant claimed that the income amounts to business profits, in terms of Article 7 of the DTA between India and Singapore. It was also the claim of the applicant that it did not have any PE in India. Since the installation project continued for less than 183 days in India, the applicant claimed it would not be taxable under Article 7 of the DTA unless it had a PE in India.

The AAR said the Department accepted that since the project executed by the applicant in India for Brahmaputra continued only for 178 days in a fiscal year and as the duration of the project is less than 183 days in a fiscal year, a PE of the applicant could not be constituted in India for the FY 2012-13 as per the provisions of Article 5.3 of the India-Singapore DTA. Hence, the Department agreed that the business profits accruing or arising to the applicant by way of the execution of the project under reference are taxable only in the country where the applicant is a resident, as per Article 7.1 of India-Singapore DTA. The income earned was therefore not taxable in India.

Return to top

[38]. TRANSFER OF SHARES: CAPITAL GAIN EXEMPT UNDER INDIA-MAURITIUS DTA - *DOW AGROSCIENCES* CASE

The Authority for Advance Rulings (AAR) has held that a transfer of shares of an Indian Co by a Mauritius entity to a Singapore entity due to a group reorganisation was not a scheme for avoidance of tax. The capital gains made were held to be exempt under the India-Mauritius DTA: *In Re Dow AgroSciences Agricultural Products Ltd*.

Dow AgroSciences Agricultural Products Limited (the Applicant) is a company incorporated in Mauritius and is a tax resident of Mauritius. The Applicant is a part of Dow group of companies. Dow Agrosciences India Private Limited (DAS India), a company incorporated in India is a part of the Dow Group and is engaged in manufacturing and trading of pesticides and insecticides.

Dow IMEA Group (ie Dow India, Middle East and Africa) was dismantled in 2010 and that is how the need for realignment of the group arose whereby DAS entity was to be shifted from an entity which falls under the Europe region to an entity which would fall in the Asia-Pacific region. This was to be done with a view to achieving better control, the Authority said.

Singapore is one of the upcoming countries in Asia-Pacific region in the opinion of the applicant and therefore, the Dow group contemplated to shift the share holding of DAS India from Mauritius to Singapore. All this exercise is also more than 5 years old from the date of the last acquisition of the shares. Thus, it cannot be said that the proposed transfer of shares was amounting to a scheme to avoid payment of taxes in India, the Authority said. It was clearly for business considerations.

The Authority therefore rejected the contention of the Revenue that this amounted to a scheme to avoid payment of taxes in India. The Authority accepted the contention raised by the applicant about its not having a PE in India.

The Authority said it did not accept the contention of the department that DAS India had not declared and distributed dividends since 2004 and therefore, to the extent of accumulated profits, sale proceeds should have to be assessed in India. The Authority said this contention was not relevant. Considering other factors like investment function made 20 years back etc., the Authority was of the view that there was no scheme for the tax avoidance.

It was argued by the Revenue mainly relying upon the Ruling in *Castelton Investment Ltd* and more particularly paragraphs 31, 32, 33 and 34 of that Ruling, that the applicant would be liable to file a return under s 139.

The Authority said a view was taken that a person earning income that is chargeable to be taxed

under the Act, had to claim by invoking s 90(2) for getting the benefit of a DTA (double tax agreement). It was, therefore, concluded by this Authority that even if a person is entitled to take relief under the DTA, he had to seek the same and that could be done only during the consideration of his return of income or at least or at best while filing his return.

The Authority took the view that the obligation on the applicant to file a return of income under s 139 of the Act cannot simply disappear merely because a person may be entitled to claim the benefit of the DTA. The applicant however, meets this argument by relying on the Rulings of this Authority in *FactSet Research Systems Inc*. reported in (317 ITR 169) and *Vanenburg Group B.V. vs. CIT* AAR No.727 of 2006.

The Authority said it respectfully disagreed with the *Castleton* judgment in so far the applicability of s 139(1) of the Act to the present applicant and answered the question in the negative.

Return to top

[39]. BROUGHT FORWARD LOSSES DISALLOWED AFTER CHANGE OF "BENEFICIAL OWNERSHIP" – *YUM RESTAURANTS (INDIA)* CASE

The Delhi High Court has held that the transfer of shares of an Indian company by a holding Co (Yum Asia) to another holding Co (Yum Singapore) resulted in change of "beneficial ownership" of shares and resulted in disallowance of brought forward losses even though the ultimate beneficial owner remained Yum USA. The corporate veil cannot be pierced to regard the ultimate holding Co as the beneficial owner, the Court said: *Yum Restaurants (India) Pvt. Ltd v ITO*.

The case involved the 2009-10 assessment year.

The facts of the case are a little complicated. The Assessee, Yum Restaurants (India) Private Limited ('Yum India'), is part of the Yum Restaurants Group with its ultimate holding company being Yum! Brands Inc. USA (Yum USA). Some 99.99% of shares of Yum India were initially held by Yum Restaurants Asia Private Limited ('Yum Asia'). After 28 November 2008, the shares were held by Yum! Asia Franchise Pte. Ltd. Singapore ('Yum Singapore') pursuant to a restructuring within the group. Yum India had a licence arrangement with Kentucky Fried Chicken International Holdings Inc. ('KFC') and Pizza Hut International LLC ('Pizza Hut') for opening KFC and Pizza Hut Restaurants in the Indian sub-continent. The licences were later assigned by KFC and Pizza Hut to Yum Asia. Subsequently it was assigned by Yum Asia in favour of Yum Singapore with effect from August 2008. Yum India also entered into an agreement with Yum Asia and subsequently with Yum Singapore with effect from August 2008 for the provision of support to Pizza Hut, KFC and ANW in South Asia.

The restructuring of the Yum Group that took place in 2008 saw the splitting up of the business region of Yum Asia, the regional franchisee, into 2 major regions, viz., China and countries other than China including India. It is stated that the group decided to hold shares in Yum India through Yum Singapore and, therefore, the entire share holding in Yum India was transferred from one holding company, viz., Yum Asia to another immediate holding company, Yum Singapore, although the ultimate beneficial owner of the share holding in Yum India remained the holding company viz., Yum USA.

The AO observed that the requirement of s 79 was that the shares should be beneficially held by the company carrying 51% of voting power at the close of the financial year in which the loss was suffered. The parent company of Yum India on 31 March 2008 was the equitable owner of the shares

but not as on 31 March 2009. Accordingly, Yum India was not permitted to set off the carry forward business losses incurred till 31 March 2008.

The ITAT analysed s 79 and noted that the set off and carry forward of loss, which is otherwise available under the provisions of Chapter VI, is denied if the extent of a change in shareholding taking place in a previous year is more than 51% of the voting power of shares beneficially held on the last day of the year in which the loss was incurred. In the present case, there was a change of 100% of the shareholding of Yum India and consequently there was a change of the beneficial ownership of shares since the predecessor company (Yum Asia) and the successor company (Yum Singapore) were distinct entities.

Having examined the facts as well as the concurrent orders of the AO and the ITAT, the Court found there was a change of ownership of 100% shares of Yum India from Yum Asia to Yum Singapore, both of which were distinct entities. Although they might be AEs of Yum USA, the Court said there is nothing to show there was any agreement or arrangement that the beneficial owner of such shares would be the holding company, Yum USA. The question of "piercing the veil" at the instance of Yum India did not arise.

In the circumstances, the Court held it was rightly concluded by the ITAT that in terms of s 79 of the Act, Yum India cannot be permitted to set off the carry forward accumulated business losses of the earlier years.

Return to top

[40]. SETTLEMENT RECEIVED BY FOREIGN INVESTORS FOR RIGHT TO SUE NOT ASSESSABLE – *ABERDEEN CLAIMS* CASE

The Authority for Advance Rulings (AAR) has held that an amount received by an FII (foreign institutional investor) under a settlement for giving up right to sue is not assessable as either capital gains or as business profits. In principle, an FII is an "investor" and not a "trader" in stocks: *In Re Aberdeen Claims Administration Inc*.

There were 3 applications made by Aberdeen Claimants Administration Inc., USA (Aberdeen US), and Aberdeen Asset Management PLC, UK (Aberdeen UK). The issues involved in all 3 applications related to the taxability of the settlement amount received from Satyam Computers Services Limited (Satyam) and Pricewaterhouse Coopers (PwC) under the provisions of the Income-tax Act, 1961. All 3 applications were taken together for hearing and a common order was passed.

In this case, the Authority had to consider whether the right to sue is property and a capital asset as defined under s 2(14) of the Act and whether it is chargeable to tax.

Among other things, the Revenue argued that the settlement amount received by the applicants was a part of their business receipts because the applicants represented mutual funds which invest their funds after careful research of the market on the basis of expectation of potential upside in the market price of share and unlike an investment, mutual funds book their profits frequently and sometimes prefer even booking loses. According to the Revenue, these are characteristics of a trader and not of an investor. The Authority said that even CBDT Circular No. 4 of 2007 did not support the stand of Revenue that Aberdeen investors were engaged in trading business.

In the result, the Authority concluded that the settlement amount received by Aberdeen investors

was not taxable under the provisions of the Income-tax Act.

Return to top

[41]. SUBSIDY GRANTED TO SET UP A WIND PROJECT IS CAPITAL RECEIPT

The ITAT Mumbai has held that a state government subsidy granted to a company to set up a wind project was a capital receipt: *UniDeritend Limited v ACIT*.

The case concerned the 2008-09 assessment year. The assessee installed a wind energy project at a cost of Rs.1189.87 lakhs. As per the policy of Maharashtra Government, to promote generation of energy through non-conventional sources to supplement the ever increasing demand for electricity in the state, the wind power projects have been granted the status of small scale industries and the state government gives a capital subsidy up to 30% of the fixed capital investment to the promoters subject to a condition that the wind power plant has successfully operated with a minimum 12% plant load factor for at least one year.

The assessee accordingly applied for the capital subsidy which was granted to the assessee during the relevant financial year 2007-08 at Rs.20 lakh. During the subsequent year ie FY 2008-09, the assessee had to refund back subsidy to the extent of Rs.10 lakhs. The AO observed that the assessee had already claimed 100% depreciation on the windmill, and as such the subsidy was required to be reduced from the cost of the asset and hence the assessee had received a benefit of Rs.10 lakh. The AO accordingly added the said sum into the income of the assessee.

The AO further observed that even otherwise the written Down Value (WDV) of the asset was nil, hence the subsidy was to be taxed as short-term capital gains under s 50 of the Act.

On appeal, the CIT(A) held that as 100% depreciation was allowed to the assessee on the asset itself, hence the receipt of subsidy was a benefit received and was hence taxable under s 41(1) of the Act. On further appeal to the Tribunal HELD allowing the appeal:

So far as the contention of the AO that the subsidy was liable to be taxed under s 50 was concerned, the Tribunal found that in this case, neither was there a transfer of any asset from the block nor had the block ceased to exist. It was not a case of capital gains by way of transfer but was only a case of capital receipt as an incentive by the state government to promote the generation of electricity through non conventional sources.

In the Tribunal's view, the subsidy received by the assessee was not taxable under s 41(1) nor under s 43(1) and nor under s 50 of the Act.

Return to top

JAPAN

[42]. JAPAN'S DRAFT BUDGET FOR FY2016 – SOME DETAILS

The Ministry of Finance has released highlights of Japan's Draft Budget for FY2016. These include:

- FY2016 Budget revenues (draft) include Y57.6 billion in tax and stamp revenues. This includes: Y18 billion in income tax; Y12.2 billion in corporation tax; and Y17.1 billion in consumption tax.
- Nominal GDP growth projected at 3.1% for FY2016.
- FY2016 Budget will seek to contain the increase in social security related expenditures in line

with the benchmark set in the Fiscal Consolidation Plan.
- The Government also proposes to enhance childcare support.

Return to top

[43]. JAPAN AND SWITZERLAND SIGN AUTO EXCHANGE OF INFORMATION AGREEMENT

Japan's Ministry of Finance has advised that, on 28 January 2016 in Bern, the Government of Japan and the Swiss Federal Council signed a Joint Statement concerning the automatic exchange of financial account information.

The automatic exchange of financial account information will begin in 2017 as part of international efforts to tackle cross-border tax evasion and avoidance. The first transmission of data will be done in 2018 in accordance with the Convention on Mutual Administrative Assistance in Tax Matters and Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information authorised by the said Convention.

Japan and Switzerland will inform each other regularly on their implementation of the OECD Common Reporting Standard in accordance with their respective domestic laws. The 2 countries confirmed that the information obtained by either state will be treated as secret and protected in accordance with Article 22 of the Convention on Mutual Administrative Assistance in Tax Matters and Paragraph 1 of Section 5 of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information in each state. Japan and the Swiss Confederation have informed each other about their voluntary disclosure programmes in their respective domestic laws.

Background: At the G20 Finance Ministers and Central Bank Governors meeting (Cairns, Australia, September 2014) and the G20 summit meeting (Brisbane, Australia, November 2014), the global Common Reporting Standard for the automatic exchange of tax information (AEOI), established by the OECD, was endorsed, and countries are called on to begin to exchange information automatically by 2017 or end-2018, subject to completing necessary legislative procedures, which the Government of Japan has already completed by its FY 2015 Japan Tax Reform.

Return to top

[44]. JAPAN AND SLOVENIA AGREE IN PRINCIPLE ON DTA

The Government of Japan and the Government of the Republic of Slovenia have agreed in principle on a double tax agreement (DTA) between Japan and the Republic of Slovenia, Japan's Ministry of Finance has announced.

The draft DTA aims to further promote investment and economic exchanges between the 2 countries by clarifying taxation on cross-border investment and economic activities between the two countries and adjusting international double taxation as well as introducing mutual agreement procedures (including arbitration proceedings) for the tax authorities to resolve disputes on tax matters between the 2 countries. The draft DTA also provides for effective exchange of information in accordance with the international standards and the mutual assistance in the collection of tax, which are expected to contribute to the prevention of international avoidance of taxation and collection.

The Ministry said the draft DTA will be signed after the necessary internal procedures have been completed by each of the 2 Governments. Thereafter, the DTA will enter into force after the completion of the approval process on both countries (in the case of Japan, approval by the Diet is

necessary).

Return to top

SOUTH KOREA

[45]. SOUTH KOREA RELEASES ECONOMIC STIMULUS PACKAGE – TAX ON CARS TO BE CUT

South Korea unveiled on 3 February 2016 a set of stimulus measures to keep Asia's fourth-largest economy on a recovery track in the face of falling oil prices and tumbling demand from China and other major economies.

The measures include boosting public spending by 6 trillion won (US$4.94 billion) and lending by policy banks by 15.5 trillion won, both during the first quarter and compared with previous plans.

Reuters said the Finance Ministry said in a statement that the individual consumption taxes on passenger cars would also be cut to 3.5% from 5%, effective until the end of June.

Return to top

TRANS-PACIFIC PARTNERSHIP

[46]. TPP AGREEMENT SIGNED

The Trans-Pacific Partnership (TPP) Agreement was signed in Auckland New Zealand on 4 February 2016.

The Agreement now has to be ratified by the parliaments of each of the 12 participating countries - Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the United States and Vietnam - before it can come into effect. That could be tricky! The US is known to have some major concerns, while a large number of community organisations in Australia are pushing for an independent assessment of the TPP before Parliament is asked to ratify it.

The Agreement will see the elimination of 98% of tariffs among the 12 participating countries. Australian Trade Minister Andrew Robb said Australia's exports of goods and services to these countries were worth A$109 billion last year – a third of Australia's total exports. In 2014, Australian investment in TPP countries was 45% of all outward investment. Tariffs will be eliminated on US$9 billion of Australia's dutiable exports to TPP countries, including US$4.3 billion worth of agricultural goods with new levels of access for beef, dairy, sugar, rice, grains and wine. A further $2.1 billion of Australia's dutiable exports will receive significant preferential access through new quotas and tariff reductions.

Bernama reported that Malaysia will see its GDP increase from US$107 billon to US$211 billion over 2018-2027. Investments for Malaysia are projected to rise by US$136 billion to US$239 billion over 2018-2027 - attributable largely to higher investment growth in the textile, construction and distributive trade.

In Australia, before binding treaty action is taken, the TPP Agreement and accompanying National Interest Analysis will be tabled in the Australian Parliament for 20 joint sitting days. Following tabling, the Joint Standing Committee on Treaties (JSCOT) will conduct an inquiry into the Agreement and will report back to Parliament. Parliament will consider any legislation or amendments to existing legislation that may be necessary to implement the Agreement.

The TPP will enter into force 60 days after all original signatories have notified completion of their domestic legal procedures. If this has not occurred within 2 years of signature, the Agreement will enter into force 60 days after the expiry of that 2-year period if at least 6 original signatories accounting for 85% of the combined gross domestic product of the original signatories have ratified the Agreement.

Further information about the TPP Agreement is on the Australian Dept of Foreign Affairs and Trade website.

Return to top

[47]. CALLS FOR US WHITE HOUSE TO ADDRESS CONGRESSIONAL CONCERNS RE THE TPP

US House Ways and Means Chairman Kevin Brady (R-TX) released the following statement after the United States Trade Representative (USTR) signed the Trans-Pacific Partnership (TPP) in New Zealand:

"*A good TPP agreement will benefit the U.S. economy and create jobs at home. Members of Congress continue to raise significant questions about this agreement to make sure it is best for America. The Administration has a responsibility to address these concerns if it expects Congress to ultimately support and move forward with TPP*."
Chairman Brady continued to urge the Administration "to work with Congress constructively, creatively, and flexibly to achieve this goal".

Return to top

TAX AND TRADE NEWS OF WIDER INTEREST

BEPS NEWS

[48]. COULD BEPS FORCE THE US TO END ITS WORLDWIDE SYSTEM OF TAXATION?

On 1 February 2016, US House Ways and Means Committee Chairman Kevin Brady (R-TX) stated that "in the weeks and months ahead", his committee is "going to focus first on drafting legislation to reform how our government taxes profits that American businesses make overseas". He said US multinational enterprises (MNEs), such as Burger King, Pfizer, Waste Connections, and most recently, Johnson Controls, decided to move their headquarters overseas because they cannot afford to compete and invest in the US due to the US tax code.

A recent Report by the Senate Permanent Subcommittee on Investigations (PSI) said that the US (alone among its peers) has retained a worldwide system that taxes American companies for the privilege of repatriating their overseas earnings, while most other nations with advanced economies have adopted competitive tax rates and territorial-type tax systems. As a result, US MNEs often have a significant incentive to relocate their headquarters overseas.

In the Report, PSI's findings offer the following lessons for US policy makers:

- The high US corporate tax rate and worldwide system of taxation are competitive disadvantages that make it easier for foreign firms to acquire US companies.
- Such US policies also strongly incentivise US companies that merge with foreign corporations

to locate their new combined headquarters outside the US.
- The long-term costs of these incentives can be measured in a loss of jobs, corporate headquarters, and revenue to the US Treasury.

Speaking to the New York State Bar Association (Tax Section) on 26 January 2016, White House Council of Economic Advisers Chairman Jason Furman characterised international taxation as "[o]ne clearly problematic area", and he said that the US worldwide system of taxation is in practice, a "stupid territorial" system that "collects little revenue from the overseas operations of subsidiaries of US multinationals". He discussed the economic case for tackling business tax reform and noted the similarity between the 28% corporate tax rate in President Obama's proposal and the 25% in leading Congressional Republican proposals.

In addition, Mr Furman stated that there is agreement that the US should replace its worldwide system of taxation with a hybrid system that prevents base erosion and increases the incentives to invest domestically. He believes that such a hybrid system would also let US corporations operate overseas and repatriate earnings without the current system's needless tax-induced obstacles.

Referencing President's Obama's plan, Mr Furman indicated that overseas earnings would be subject to a 19% minimum tax when earned (with allowances for a basic rate of return and foreign taxes paid), but no additional tax on repatriation.

Chairman Brady has confirmed his intentions to focus heavily on US international tax reform by the recent hiring of Barbara Angus, a Tax Principal at Ernst & Young LLP and the leader of its international tax policy services. Ms Angus will serve as the Chief Tax Counsel for the U.S. House Ways and Means Committee. Interestingly, in her written testimony at the December 2015 House Ways and Means Subcommittee on Tax Policy hearing to examine the final OECD BEPS recommendations, Ms Angus stated that the BEPS project and countries' actions with respect to the BEPS recommendations will dramatically change the global tax landscape, and the aspects of the current US tax system that detract from the attractiveness of the US as a location to headquarter and invest will become more acute. She also said the BEPS project and the response by foreign countries should be viewed as yet another reason why US tax reform must be an urgent priority.

Source: Thomson Reuters International Taxes Weekly – on Checkpoint WORLD

Return to top

[49]. WHAT'S AHEAD FOR THE BEPS REGIME? PWC

In a recent newsletter, PwC reflected on the changes and tax authority reactions following the 5 October 2015 release of the BEPS final reports; and they consider the framework of the BEPS project and look ahead to what likely will happen throughout 2016 and beyond.

PwC says the OECD, with input from other stakeholders, is to conceive a "framework" for ongoing work, implementation and monitoring of BEPS, with involvement - on an equal footing - of interested countries and jurisdictions, etc, other than OECD and G20 members. While the final BEPS reports indicated this would be done by early 2016, PwC considers the end of February seems more likely.

PwC notes however, that some of the transfer pricing work (eg the work on financial transactions) will not finish until 2017. Note that 31 December 2017 will mark the deadline for filing CbC reports

for 2016 calendar-year taxpayers in some countries - the filing requirement applies for fiscal years beginning 1 January 2016 in those countries - and production of the first reports by the FTA MAP Forum under the new peer monitoring process. Thereafter, PwC says 2020 is significant as the deadline for publishing various formal reviews established by the final BEPS reports.

PwC says it is still unclear how CbC reporting requirements will impact the fund/ private equity industry, specifically whether the management side of the business should report the funds' side. This is exacerbated by differences in generally accepted accounting principles; companies get different outcomes depending on which accounting rules they use, the firm said.

The newsletter also gives extensive summaries of each Action item from the BEPS project, and what the authors anticipate will occur in 2016 regarding the 2015 Final Reports recommendations to countries and tax authorities.

Overall, PwC warns of concerns over BEPS implementation eg:

- some of the specific BEPS recommendations are complex and countries may not implement them in full;
- in other instances, the recommendations leave countries with optional routes (including some of them being best practices rather than standards);
- countries may decide to implement their own approaches unilaterally, independent of the BEPS recommendations.

PwC suggests that businesses should consider how the BEPS project recommendations will impact them and take appropriate action now. Time is of the essence, the firm said, since notwithstanding the overall timeframe, implementation is in process (and well advanced in some areas) and tax authorities are already taking a more aggressive stance.

Return to top

[50]. CBC REPORTING - HOW BUSINESSES CAN PREPARE – DELOITTE

One of the cornerstones of the new paradigm under BEPS is Country-by-Country Reporting (CbCR). In a recent newsletter, Deloitte Singapore considered frequently asked questions by business leaders about CbCR including what information is needed, who CbCR applies to, and how businesses can prepare.

Deloitte notes that CbC reports are primarily to be filed where the parent company is headquartered (HQ). If the HQ country has not implemented CbCR however, MNCs should file in the country with CbC reporting where their most significant activities occurs.

Deloitte recommends that businesses should begin taking action as soon as possible. The firm says businesses should gauge readiness to collecting and aggregating the data needed under new CbCR requirements. Businesses should assess how they will gather required data from disparate sources and what technology is best suited to help their organization input the data and create the required reports. Many companies are starting with simulations on their 2013 and 2014 data, Deloitte said, to assess their ability to comply and to gain an understanding of how their reports might be viewed by different stakeholders.

Deloitte says that while there is no specific requirement on how data is collected, businesses should bear in mind that the combined group information needs to be consolidated into one report so to the extent data collection can be standardised, this will assist efficiency.

CbCR relies heavily on data. The step that is likely to consume the most time will be data aggregation, Deloitte says. Data collection requires a standard, centralised method in which all stakeholders have the same understanding of their role in the process and of the definition and parameters governing the data being requested.

Return to top

EU NEWS

[51]. EU ANTITRUST CHIEF REJECTS US CRITICISM OF APPLE, STARBUCKS TAX CASES

Europe's antitrust chief has signalled her determination to go after Apple, Starbucks and McDonald's over their tax deals in the bloc, dismissing US criticism of her crackdown on the companies, Reuters has reported.

European Competition Commissioner Margrethe Vestager's comments came 3 days after senior US Treasury official Robert Stack met her team in the latest lobbying effort against her clampdown on tax deals involving US as well as EU companies.

Vestager, who was not at the meeting, indicated she had not been swayed by Stack's arguments, similar to those made to a Senate committee last December. "It is the same argument as we have heard before," she told reporters on the sidelines of a conference organised by the Global Competition Law Centre. "Just as it is an obvious right for US tax authorities to tax revenues when they are repatriated, it is also for European tax authorities to tax money that is made in the member states."

All the companies have denied wrongdoing. While Starbucks was told to pay up to €30 million in back taxes to the Netherlands in October last year, Apple could end up with a bigger bill to the Irish, Reuters said. A decision is likely to come in the spring.

Return to top

UNITED STATES

[52]. US TO ACCEPT BILATERAL APA APPLICATIONS BETWEEN US AND INDIA

The US IRS has announced that the Advance Pricing and Mutual Agreement office will accept applications for bilateral advance pricing agreements (APAs) between the United States and India beginning 16 February 2016. This formally ends the suspension of transfer pricing dispute resolution relations between the 2 countries in effect since 2013.

According to the announcement, the decision to begin accepting APA applications is based on the significant progress the US has made with India under a frame work agreed to in January 2015 for resolving competent authority cases involving Indian-resident affiliates performing information technology-enabled services or software development services. Under that framework, over 100 of approximately 200 cases have already been resolved.

“We appreciate the efforts of the Indian Competent Authority and his team, as well as the IRS team,

for working to reach common understandings and procedures for resolving differences fairly," said IRS Commissioner John Koskinen. "Multi-national firms operating in both the US and India are the beneficiaries of this effort."

Return to top

UNITED KINGDOM

[53]. NON-UK DOMICILES TO BE SUBJECT TO UK INCOME TAX AND CGT – POLICY PAPER RELEASED

The UK HMRC has released a policy paper inviting views on proposed legislation that would deem certain persons, who would otherwise be non-domiciled in the UK as a matter of general law, to be UK domiciled for the purposes of income tax and capital gains tax. Comments are due by 2 March 2016.

The UK currently provides tax advantages for some individuals who are resident there but who are not domiciled in the UK, often referred to as "non-doms". These advantages mean that foreign individuals can live and work in the UK without being subject to UK tax on income and gains earned outside the UK and not remitted there (ie brought into the UK) but the UK Government believes they can give rise to unfair tax outcomes.

UK resident non-doms currently pay tax on UK source income and gains in common with other UK taxpayers. However, in contrast to those who are resident and domiciled in the UK, a non-dom's foreign income and gains are not taxable in the UK if the income and gains remain overseas. The main UK tax advantage of being a non-dom is that despite being resident in the UK, non-doms pay tax on income and gains earned outside the UK only when these are remitted to the UK using the "Remittance Basis" of taxation provided for in Chapter A1 of Part 14 of the Income Tax Act 2007.

Proposed revisions

Legislation will be introduced in Finance Bill 2016 to deem certain persons, who would otherwise be non-domiciled in the UK as a matter of general law, to be domiciled in the UK for the purposes of income and capital gains tax. They will lose the main advantages for non-doms of the UK's tax system.

The 2 deeming provisions are given by Conditions A and B. Condition A applies to anyone born in the UK with a UK domicile of origin and whilst they are UK resident. Condition B applies to anyone who has been resident in the UK for at least 15 out of the previous 20 tax years.

The measure restricts access to the Remittance Basis so that anyone deemed UK domiciled by virtue of either Condition A or B cannot access the Remittance Basis.

In addition, the measure would amend other aspects of income tax and capital gains tax law that offer advantages to non-doms but which do not directly rely on parts of the Remittance Basis to be amended.

Date of effect

The changes would have effect for most Income Tax and Capital Gains tax purposes on and after 6 April 2017. The part of the measure affecting capital gains tax in respect of foreign chargeable gains accruing to temporary non-residents will not affect accruals arising in respect of periods of

temporary non-residence beginning on or before 7 July 2016.

Return to top

AUSTRALIA

[54]. MULTINATIONALS AND NEW ANTI-AVOIDANCE LAW - ATO IDENTIFIES NEW TAXPAYERS

At a recent address to the National Press Club in Canberra, Australia's Assistant Treasurer, Ms Kelly O'Dwyer, provided an update on the Government's action concerning multinational tax avoidance. Following the introduction of the multinational anti-avoidance law, which came into effect on 1 January 2016, Ms O'Dwyer said the ATO has already identified 80 taxpayers as having arrangements in the general scope of the law and a further 300 taxpayers are being profiled.

The Assistant Treasurer also said the Government is "currently finalising options for a tough new tax taskforce so Australians can be confident that no stone is left unturned to ensure that businesses that operate in Australia are paying their fair share of tax on the economic activity taking place in Australia". The taskforce will be accountable to the Government through transparent reporting, she added.

In addition, Ms O'Dwyer said the Government will also consider changes to the law to encourage, protect and reward whistle-blowers whose information reveals artificial tax structures and misconduct.

Return to top

[55]. AUSTRALIA'S LARGEST-EVER TRADE MISSION TO CHINA IN APRIL 2016

Australia's Minister for Trade and Investment Andrew Robb has called for Australian business leaders to join what is expected to be Australia's largest-ever trade mission to China between 11-15 April 2016.

Part of Australia Week in China (AWIC) 2016, the Government's biennial trade, investment, education and tourism promotion, the group will visit key cities across China including Hong Kong, Shanghai, Beijing, Chengdu, Shenyang, Hangzhou, Xiamen, Guangzhou and Shenzhen.

Mr Robb said the program would highlight benefits from the China Australia Free Trade Agreement, which entered into force on 20 December last year. It also builds on the success of the first Australia Week in China in 2014 which attracted 750 delegates.

"With 2 rounds of tariff cuts on Australian goods exports delivered already under the Agreement in rapid succession, and a whole range of new opportunities for Australian services, now is the time to expand existing links and explore new possibilities," Mr Robb said.

"Registrations are now open and I urge all businesses with an interest in China to consider taking part."

The mission includes a range of business streams including innovation, agribusiness, premium food, beverage and consumer goods, mining services and equipment, health, innovation, education, financial services and urban sustainability.

Activities include seminars and site visits to high-level meetings and networking events with senior

Chinese Government officials and business leaders.

Return to top

[56]. NEW RATES OF EXCISE DUTY AND CUSTOMS DUTY FOR ALCOHOL AND FUELS

The Australian Comptroller-General of Customs, in accordance with subs 19(9) of the *Customs Tariff Act 1995*, on 1 February 2016 gazetted a notice of the increased rate of customs duty for excise-equivalent goods that apply on and from 1 February 2016 in respect of alcohol and petroleum fuels including diesel, ethanol and biodiesel, and LNG and LPG.

The increased rate of customs duty applies for excise-equivalent goods classified to a subheading of Schedule 3 to the Tariff Act, as specified in an item in the tables in Schedules:

- 5 (US originating goods)
- 6 (Thai originating goods)
- 7 (Chilean originating goods)
- 8 (ASEAN-Australia-New Zealand originating goods)
- 9 (Malaysian originating goods)
- 10 (Korean originating goods)
- 11 (Japanese originating goods)
- 12 (Chinese originating goods).

Return to top

NEW ZEALAND

[57]. DTA BETWEEN NEW ZEALAND AND SAMOA ENTERS INTO FORCE

A new double tax agreement (DTA) between New Zealand and Samoa entered into force on 23 December 2015. The treaty, signed on 8 July 2015, is the first of its kind between the 2 countries. It replaces the 2010 tax information exchange agreement between the 2 countries. The new DTA was given effect to in NZ by the *Double Tax Agreements (Samoa) Order 2015*.

Under the DTA, withholding tax rates are as follows:

- Dividends - 5% if the beneficial owner is a company directly holding at least 10% of the voting power of the company paying the dividends; otherwise 15%.
- Interest - 10%.
- Royalties - 10%.

The DTA applies in respect of withholding tax in both countries from 1 February 2016. In respect of other taxes, it applies in New Zealand from 1 April 2016 and applies in Samoa from 1 January 2016.

Return to top

WORLD TRADE DEVELOPMENTS

[58]. EU PARLIAMENT BACKS TRADE IN SERVICES AGREEMENT – AGREES THAT CHINA SHOULD JOIN

The EU and 22 countries (including Hong Kong, Japan, Korea, Taipei, Australia, Pakistan, New Zealand

and the US), representing 70% of world trade in services (including financial services), are currently negotiating the Trade in Services Agreement (TiSA).

The EU Parliament on 18 January 2016 voted in favour of recommendations on the Agreement made by members of the European Parliament (MEPs). In a report, MEPs set out their guidelines to the Commission, which is negotiating the deal on behalf of the EU. Only once the talks are concluded will MEPs have the final say on whether to approve or reject a TiSA deal.

Significantly, MEPs supported China's request to join the negotiations and seek to ensure future "multilateralisation" of the agreement.

The MEPs recommendations were approved by the EU Parliament on 3 February 2016. The vote was 532 votes to 131, with 36 abstentions.

To protect the EU firms from unfair competition abroad, MEPs ask the EU negotiators for:

- reciprocity in market opening, as services in the EU are already more open to foreign competition than those of its partners. In particular, opening should be sought in international public procurement, telecoms, transport, financial and digital services;
- curbs on third countries' restrictive practices against EU firms, such as forced data localisation or foreign equity caps.

MEPs supported China's request to join the negotiations and seek to ensure future "multilateralisation" of the agreement.

Return to top

[59]. EU SEEKS TO BRING US TRADE TALKS TOWARDS A CLOSE BY MID-YEAR

The European Union aims to bring free trade negotiations with the United States towards a close by around mid-year, a necessary step if a deal is to be clinched before a change of President in the United States.

Reuters said the 2 sides are trying to agree on the Transatlantic Trade and Investment Partnership (TTIP), a free trade deal that could deliver economic benefits of more than US$100 billion for both economies, each searching for growth in the face of a Chinese economic slowdown.

After more than 2 years of talks, both sides say a deal could be clinched this year before Barack Obama's term as US President ends. Waiting for a new President with different objectives risks severely delaying any deal, Reuters said.

"We have to be approaching the endgame by the summer," EU Trade Commissioner Cecilia Malmstrom told a news conference at the end of talks between EU trade ministers.

The partners have scheduled rounds of talks in February, April and July 2016, with a view to having a consolidated text on almost all issues, leaving out the most sensitive topics such as agricultural quotas.

In February, the partners will discuss the services sector, opening up public tenders and the European Union's proposal for a new court to settle disputes between investing companies and states, one of the most controversial parts of a would-be deal.

Return to top

RECENT TAX ARTICLES

[60]. RECENT TAX ARTICLES OF INTEREST

[*Citing tax and related articles from various journals of interest to practitioners, advisers and corporate tax departments; a useful research and reference tool*]

Acuity [Chartered Accountants Australia and NZ] - February 2016

"Growing up" – Australian businesses need to do more than just trade with Asia – they actually need to be in Asia – by Andrew Parker
"Pearly gateway" - Hong Kong is increasingly the door through which Pearl River Delta businesses come out to meet the world – by Lachlan Colquhoun
"Welcome to the TPP" – What does it mean for business? – by Anthony O'Brien

eJournal of Tax Research [University of NSW] - **Volume 13 No 3, December 2015**

"Equal taxation as a basis for classifying financial instruments as debt or equity - a Swedish case study" [p 677] - by Axel Hilling and Anders Vilhelmsson
"Employee views of corporate tax aggressiveness in China: The effects of guanxi and audit independence" [p 716] – by Grantley Taylor, Ying Han Fan and Yan Yan Tan
"Tax compliance behaviour in Australian self-managed superannuation funds" [p 740] – by George Mihaylov, John Tretola, Alferd Yawnson and Ralf Zurbruegg
"Managing compliance risks of large businesses: A review of the underlying assumptions of co-operative compliance strategies" [p 760] – by Lisette van der Hel-van Dijk and Maarten Sigle
"TravelSmart or travel tax breaks: is the fringe benefits tax a barrier to active commuting in Australia?" - Broad exemptions from the FBT are required to support commuters who choose active travel alternatives [p 819] – by Helen Hodgson and Prafula Pearce

[NOTE: From time to time, the *Asia Tax and Trade Bulletin* [formerly the ASEAN Tax Bulletin] will contain cross-references to different Issues of the Bulletin. They will appear as, for example, 2016 ATB 1 [12] – this means Issue 1 para [12] of the 2016 *Asia Tax and Trade Bulletin*.]

Return to top

Thomson Reuters | 18 Science Park Drive | Singapore 118229