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China

Guidance on High Technology Enterprises

- The Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation (SAT) jointly issued the guidelines for qualification of the New High Technology Enterprises (NHTE) on 8 July 2008 (*Guo Ke Fa Huo* [2008] No. 362; henceforth “the Guidelines”). The Guidelines, which are based on the “Administrative Measures of Classification of the New High Technology Enterprises” and the “Key High-New Technology Areas Supported by the State”, are summarized below.
- The Guidelines provide further clarification on the NHTE assessment criterion previously set out in the Measures: *Ownership of core proprietary intellectual property*. The exclusive license rights held by the applicant must be a license for sole use on a worldwide basis and not merely the rights to exploit the intellectual property (IP) in China. All eligible NHTEs must, legally or economically, own the core proprietary IP rights on a worldwide exclusive basis. “Core proprietary IP rights” are limited to inventions, new models, new designs, software copyrights, patents of integrated circuit designs, and new species of plants. The IP must have been obtained within the 3 previous years, including IP obtained through exclusive licensing rights for a period of more than 5 years. The IP must support the key production techniques, or services, of the enterprise.
- The Guidelines set out the definition of “R&D activities”, and how to define R&D projects. It also sets out the scope of qualifying R&D expenditure and requires the enterprises to capture the relevant expenditure in a prescribed format.
- Generally, qualifying R&D expenditure are classified as and limited to:
 - Personnel expenses: salaries, bonuses, overtime payment, subsidies, allowances and other payments related to the employment of researchers;
 - Direct investment: purchasing materials for the research purposes such as water and energy, testing equipment, rents of fixed assets;
 - Depreciation and amortization: costs related to depreciation of machinery or equipment, buildings, renovation, maintenance and repair of the buildings;
 - Design costs: expenses related to development of the new ideas, design of the new products, techniques, technical standards and production process;
 - Expenses related to equipment testing: R&D expenditure incurred in developing machinery/equipment, models, tools, controlling process or new production methods and standards. Expenses incurred for installation and construction are not included;
 - Amortization of intangible assets: expenses related to purchase of intangibles for research purposes such as patents, know-how, licences, special techniques, design and calculation methods;
 - R&D expenses paid to the external organizations: expenses on R&D activities paid by the enterprise at arm’s length to other enterprises, universities, research institutions, technical service organizations and foreign organizations. The results of the R&D must be possessed by the enterprise and in the course of the enterprise’s business. Only 80% of such expenses will be allowed; and
 - Other expenses: the expenses incurred for example on office expenses, telecommunication, license/patent fees, insurance premiums. The expenses should not, however, exceed 10% of the total amount of the R&D expenditures unless otherwise provided by laws and regulations.
- It is required that at least 60% of the R&D expenditure must be incurred in China.
- Prescribed proportions of technical and research personnel directly involved in the R&D activities must be achieved and

The information below is produced by Loyens & Loeff in Singapore and Tokyo. It is designed to alert those (interested in) doing business in the Asian region to recent developments in the region. Such developments are discussed in brief terms and are based on generally available information. The materials contained in this publication should not be regarded as a substitute for appropriate detailed professional advice. The information below was assembled based on information available as at 30 September 2008.

maintained. "Technical and research personnel" refer to those who work on the R&D for more than 183 days in a year. Full-time personnel must be verified by employment contracts and part-time personnel must meet the 183 days requirement.

- The revenue from the new high technology products/services is referred to as the sale proceeds of these products or services, technology transfer, proceeds from carrying out the contractual assignments such as technical design and technical project. Revenue arising from these products and services must be more than 60% of the total annual turnover of the enterprise and the products/services generating the income should fall into the encouraged items of the Catalogue (which was published together with the Measures).
- Four factors are used in the assessment:
 - own proprietary IP rights: 30 points;
 - R&D outcome conversion capability: 30 points;
 - quality of R&D management: 20 points; and
 - growth potential indicators: 20 points.

VAT reform expected

- The State Council has reportedly approved the proposal of the Ministry of Finance to reform the current VAT system. The new rules of VAT are likely to apply as from 1 January 2009. The reform will transform the so-called production-based VAT into a consumption-based VAT, which forms the basis of the VAT systems of most countries applying VAT. This means that the input tax on purchases of fixed assets such as machinery and equipment can be refunded. Currently, a trial project regarding the input tax credit on fixed assets is being conducted in the northern-east regions of China. With this reform, the input VAT credit for fixed assets will be brought into practice nationwide.

Tax treatment of services provided by parent company clarified

- The State Administration of Taxation (SAT) issued a notice (Guo Shui Fa [2008] No.86) on 14 August 2008 clarifying the tax treatment of service fees charged by a parent company to

its subsidiaries within China. The details of the Notice are summarized below.

- The expenses incurred by a parent company for providing various services to its subsidiaries must be charged at an arm's length and treated as normal service costs for the purposes of enterprise income tax. If the parent company fails to charge its subsidiaries at an arm's length, the tax authorities are entitled to make adjustments.
- A parent company and its subsidiaries are required to enter into a service contract or agreement to determine the content and price of services and other related amounts. The service fees paid according to the contract or agreement mentioned above shall be included in the taxable income of the parent company and are deductible by the subsidiaries.
- In cases where a parent company provides the same kind of services to more than one subsidiary, the parent company may charge its subsidiaries by either entering into a separate service contract/agreement with each subsidiary, or a master "service sharing agreement" with all the subsidiaries receiving the services. This means that the parent company enters into an agreement to reasonably allocate the real costs incurred *plus* a certain profit margin among the benefiting subsidiaries (regardless of whether they profitable enterprises, loss-making enterprises, or enterprises enjoying tax incentives).
- Notwithstanding the above, management fees paid by the subsidiaries are not deductible in computing taxable income of the subsidiaries.
- Subsidiaries can only deduct the service fees paid to the parent company if they are able to submit the service contract/agreement or other related supporting documents. The deduction of service fees will be denied to those subsidiaries who fail to do so.

Stamp duty suspended on stock purchases

- China's State Council has authorized the Chinese tax authorities to suspend the 0.1% stamp tax on stock purchase beginning 19 September to "encourage market confidence", the state-run China Central Television network announced 18 September. It is unclear how long the suspension will last. The stamp tax on share selling will remain unchanged at 0.1%.

Owner-occupied residential properties by individuals not subject to stamp duty and land appreciation tax

- The MOF reportedly announced on 22 October 2008 that purchase and sale of owner-occupied residential properties by individuals would not be subject to stamp duty and land appreciation tax as from 1 November 2008. The measures are meant to be temporary. Further, the deed tax on such transactions will be reduced from 3% to 1% from the same date. The local governments are also allowed to take other measures, such as reducing various fees relating to the transactions of these properties, to boost the housing market.

China clarifies VAT rebate for embedded software

- The P.R.C. Ministry of Finance and the State Administration of Taxation (SAT) have jointly issued a new tax notice further clarifying how to apply the VAT rebate to sales of embedded software. (Cai Shui [2008] No. 92, dated 30 June 2008).
- For self-developed embedded software to qualify for the VAT rebate, the new Notice 92 first reverts to a position similar to Cai Shui Zi [1999] No. 273 by emphasizing that the sales amount (rather than cost) of the embedded software must be separately and clearly accounted.
- The P.R.C. Ministry of Finance and the State Administration of Taxation (SAT) have jointly issued a new tax notice further clarifying how to apply the VAT rebate to sales of embedded software. (Cai Shui [2008] No. 92, dated 30 June 2008).

China adjusts export VAT rebate levels

- China on 1 August raised the VAT rebate rate on many textile and garment exports from 11% to 13% but eliminated VAT rebates for exports of various products posing environmental hazards or health hazards to factory workers.

Reduced tax rate for low-profit enterprises not applicable to non-residents

- According to Art. 28 of the Enterprise Income Tax Law, qualifying low-profit enterprises are taxed at a reduced income tax rate

of 20%. On 3 July 2008, the State Administration of Taxation issued a Notice (GuoShuiHan [2008] No. 650) announcing that non-residents do not qualify for the above-mentioned tax incentive. The Notice clarifies that “low-profit enterprises” are enterprises whose income from all production and taxable activities are taxable in China, and therefore do not include non-residents.

International Tax Developments

- Free Trade Agreement with Singapore. On 23 October 2008, China signed a free trade agreement with Singapore. The agreement is scheduled to take effect on 1 January 2010 in China and will remove import duties on 95% of Singapore's exports to China. From January 2009, 85% of the exports will be zero rated. The agreement also liberalised work permit procedures for a number of prescribed professional sectors.

Hong Kong

Allocation of expenses

- On 21 July 2008, the Inland Revenue Department issued Departmental Interpretation and Practice Note no. 3 (revised) setting out the IRD's views on the apportionment of indirect expenses by companies operating in Hong Kong who carry on their business both in and outside Hong Kong. The note replaces the previous note on the same subject, issued in 1989. The basis for apportionment discussed in the DIPN is either turnover, gross profit, income or assets.

Green Tax Deductions

- The Hong Kong government has released answers to frequently asked questions about recently enacted incentives for business investment in renewable energy installations and environmentally friendly equipment.

Information reporting requirements notice issued by the IRD

- On 10 July 2008, the Hong Kong Inland Revenue Department has published a notice that outlines information reporting requirements for individuals and employers.

International Tax Developments

- China. The second protocol, signed on 30 January 2008, to the arrangement for the avoidance of double taxation on income between the Mainland of China and the Hong Kong Special Administrative Region, signed on 21 August 2006, entered into force on 25 June 2008. The protocol generally applies retroactively from 11 June 2008.

India

Captive software development entity

- The Income Tax Appellate Tribunal (ITAT) delivered a ruling dated 10 June 2008 in the case of *E-Gain Communication Pvt. Ltd. v. Income Tax Officer* (2008-TIOL-282-ITAT-PUNE) on the issue of whether an Indian software company providing services to its US parent at cost-plus 5% was appropriate under the Indian transfer pricing regulations.
- The key issue before the ITAT was whether it was justified to make the upward adjustment to the profit margin disclosed by the Taxpayer on its transactions with its US parent.
- The ITAT held that no adjustment was warranted under the Indian transfer pricing regulations, and hence, the upward adjustment made to the net profit margin was not legally valid. The ITAT observed that the Taxpayer was a captive company rendering services of software development to its parent company. In accordance with the agreement between the Taxpayer and its parent company, the Taxpayer was to be remunerated a cost-plus 5% for software developed and supplied to the parent company. Although there was no dispute between the authorities and taxpayer on the use of the Transactional Net Margin Method (TNMM) as the method of computing the arm's length price (ALP), the area of difference was primarily in the comparables selected by the TPO for the purposes of deriving the average profit margin of the comparable companies, without adjustments being made to account for the differences in the comparables.
- The ITAT observed that for the purposes of comparing transactions or enterprises using the TNMM, differences which are likely to materially affect the price, cost charged or paid, or profits in the open market should be taken into consideration for the purposes of making reasonable and necessary adjustments to eliminate the differences which may have material effects on the transaction. If the differences are such that they cannot be evaluated, the transaction may then have to be eliminated from the comparability study. As transfer pricing requires the adjustment of differences between international transactions and the comparable uncontrolled transactions, the application of the TNMM similarly requires that suitable adjustments be made for differences based on the functions, assets and risks (FAR) analysis and other relevant factors. The Indian transfer pricing regulations require that if there are material differences, those differences are to be considered and suitable adjustments should be made. The tax authorities were in error for not making those adjustments.
- The ITAT further observed that the tax office had erred in its conclusion that it was not necessary to perform functional and other analyses to ascertain the differences in transactions due to the fact that the TNMM was more tolerant of minor functional differences, and his reliance on the OECD Transfer Pricing Guidelines (the OECD Guidelines) of July 1995 (paragraph 3.2.7) was out of context. The strength and weaknesses of the TNMM are compared to the other methods in the OECD Guidelines, and in this case, the TPO had overemphasized a particular positive point of the TNMM.
- It was held by the ITAT that the comparison of controlled and uncontrolled transactions under the TNMM should entail that differences which have a tangible bearing on costs, prices or profits are to be accorded its proper weightage in order for reasonable adjustments to be made to eliminate such differences. The tax authorities should endeavour to perform robust and comprehensive FAR analyses for the selection of comparable companies, and if necessary, adjustments should be made to the operating profits of comparable companies.
- The ITAT held that even when TNMM method is applied to determine the ALP in accordance with the OECD Guidelines, the FAR assumed both in the controlled and uncontrolled transaction should be taken into account. Also, it is not permissible to ignore specific Indian regulations on the subject of transfer pricing.

- The ITAT noted that the transfer pricing regulations of the US provided for necessary adjustments for differences in the application of methods similar to TNMM, and further noted that both the OECD Guidelines and the US Transfer Pricing Regulations, in fact, required the necessary adjustments be made for differences affecting profitability. According to the ITAT, the TNMM method affords practical solutions to otherwise insoluble transfer pricing problems, if used sensibly and with appropriate adjustments to account for the differences in the various types of scenarios.
- The ITAT held that CIT(A) was justified in selecting comparable companies which registered a turnover between INR 50 million to INR 250 million, but the consideration of turnover was not the only relevant factor in a transfer pricing analysis. There were other material factors which had to be taken into account which affect the profitability of a company based on the FAR analysis, which had to be performed. Since this exercise was not performed, the ITAT concluded that the comparison made by the tax office was improper and hence illegal. The ITAT also observed that while it did not agree with the Taxpayer's argument that only entities which met a certain turnover criteria could be considered as a comparable company for the ALP evaluation, and similarly, it did not see the tax office's justification for the consideration of "oversized" entities.
- The Taxpayer produced evidence to demonstrate that two comparable companies selected by the tax office in his analysis had other income such as interest from deposits, dividend income and income from the sale of licenses, which increased its profit margin. Other income cannot be included for the purpose of the comparability when the tested party is solely carrying on a business of software development. If it was not possible to compute and exclude receipts and expenditures from the categories of income which did not relate to the software development business, such companies should have been excluded as comparable companies. The ITAT also held that the adjustments to the profit margin was required in the case of the Taxpayer as it did not undertake any risk in the transactions with its parent company. Accordingly, the ITAT allowed the appeal and removed the additional taxable income levied on the Taxpayer resulting from the upward adjustments to the ALP in its dealings with the US parent company.

Engineering design services not taxable as royalty

- It was reported on 27 August that India's Income Tax Appellate Tribunal, Delhi, in *Parsons Brinckerhoff India Pvt. Ltd. v. Assistant Director of Income Tax*, ruled that the consideration an Indian company paid to a Thai subcontractor for engineering calculations, designs, and drawings was not a royalty payment and therefore was not subject to Indian withholding tax.

Bandwidth charges paid to non-resident

- It was reported on 30 July that the Authority for Advance Ruling and the Delhi High Court recently issued two decisions favouring the taxpayer in cases involving the provision of bandwidth to businesses in India by a non-resident provider, ruling in both instances that bandwidth charges were not taxable in India as royalty payments or technical service fees.

Securities lending arrangements

- The Central Board of Direct Taxes (CBDT) issued Circular No. 2/2008 in early 2008 with regard to the tax treatment of securities lending arrangements. By way of background, the Securities and Exchange Board of India (SEBI) in December 2007 issued a circular permitting all classes of investors (i.e. individuals, institutions, etc.) to short sell; additionally, in order to provide a mechanism to enable the settlement of such securities sold short, it introduced a Securities Lending and Borrowing Scheme.
- As a result, the following taxation issues arose:
 - would the lending/borrowing of securities amount to a "transfer" of a capital asset by the lender for the purposes of the Income Tax Act 1961 (ITA); and
 - would the lending/borrowing of securities be subject to the Securities Transaction Tax.
- The CBDT in Circular No. 2/2008 confirms that:
 - the transaction would not be regarded as a "transfer" as Sec. 47(xv) of the ITA provides the lending of securities under guidelines issued by the SEBI would not be regarded as a transfer; and
 - the Securities Transaction Tax would not be applicable.

Mandatory contribution to Employees Provident Fund and Pension Scheme introduced

- With effect from 1 October 2008, “international workers” will be required to contribute to India’s Employees Provident Fund Scheme and Employees Pension Scheme.
- Broadly, an “international worker” is defined as:
 - an Indian employee having worked, or going to work, in a foreign country; and
 - an employee, other than an Indian employee, and not holding an Indian passport, who is working for an establishment in India to which the Employees Provident Fund Act 1952 applies.
- All international workers will be required to participate in the Employees Provident Fund Scheme 1952 unless they are an “excluded employee”. An “excluded employee” is an international worker who is contributing to a social security programme of his/her country of origin, either as a citizen or resident. A Social Security Agreement between the country of origin and India must exist, and the individual must qualify as a detached worker as specified in the Agreement. Accordingly, Employers will now have additional reporting obligations in respect of their international workers.
- Terms such as “pensionable service” and “pensionable salary” have been defined to take into account the changes above. Additionally, the benefits receivable upon leaving employment prior to reaching the pensionable age are differentiated between foreign nationals from a country with which India has a Social Security Agreement and those that do not.
- Implications:
 - Foreign nationals working in India are now brought under the ambit of the Provident Fund.
 - International workers would be required to contribute a percentage of their salary to the Indian Social Security Scheme and employers will be required to make a matching contribution.
 - Where no Social Security Agreement with India exists, the inbound/outbound employee will be required to contribute to the host country’s social security scheme.

- Where a Social Security Agreement exists, the inbound/outbound employee may remain on the country of origin’s social security scheme.

Decision on whether activities of liaison office resulted in taxable income

- It was reported that the Income Tax Appellate Tribunal (ITAT) delivered, a ruling on 28 May 2008 in the case of *Nike Inc. India Liaison Office v. Assistant Commissioner of Income Tax, International Tax* (unreported) on whether the activities of a Liaison Office (LO) amounted to trading/commercial activities thus resulting in tax income in India.
- Nike Inc., a US-based company, had applied to the Reserve Bank of India (RBI) to open a LO in India. Nike Inc. had categorically stated in its application that the LO will neither undertake any trading or commercial activities nor enter into any business contracts without prior approval of the RBI. It was also committed that the LO will not charge any commission/fees etc. for any of the services rendered by the LO in India. Also, the entire expenditure of the LO in India would be met by Nike Inc. via remittances sent from the US through regular banking channels. The RBI gave Nike Inc. its permission to establish a LO in India subject to the fulfillment of the above conditions.
- The LO’s activities in India were to:
 - act as a liaison between Indian manufacturers and Nike Inc.;
 - provide an opinion on purchase prices;
 - purchase goods for export;
 - ensure the quality of the goods to be exported; and
 - track the shipments.
- The tax authorities held that the nature of activities carried out by the LO resulted in a permanent establishment (PE) in India and that the purchase of goods for the purposes of export did not fall within the definition because the title of goods did not transfer from the seller to the buyer (i.e. Nike Inc.). The fact that Nike Inc. did not “purchase” the goods meant that it could not be classified as the buyer (i.e. the LO was being classified as the buyer) and thus Nike Inc. did not qualify for the exemption provided under Sec. 9(1) of the Indian Income Tax Act 1961 (ITA). Sec. 9(1) of the ITA states that a non-resident shall not

be deemed to have any income accrue or arise in India as a result of operations that are solely confined to the purchase of goods in India for the purposes of export. Additionally, the tax authorities contended that the relationship between Nike Inc.'s activities outside India and the activities of the LO in India, contributed to Nike Inc.'s earnings and so a percentage of such profits were attributable to and taxable in India.

- On appeal, the Commissioner of Income Tax (Appeals) partly agreed with the view of the tax authorities and held that Nike Inc. generated income in India with regards to its operation through the LO but reduced the quantum of taxable income in India as assessed by the tax authorities from 11.37% of Nike Inc.'s global income to 5%. Both Nike Inc. and the tax authorities appealed the decision to the ITAT.
- The issue before the ITAT was whether the LO was involved in commercial activities and thus generating income in India. The ITAT held that the LO should not be treated as a PE as it acted only as an agent and that all services provided were for the purchase of goods for exports and no income was earned in India. The ITAT observed that:
 - The LO was established solely for the purpose of helping Nike Inc.'s affiliates located in different parts of the world to buy goods etc. from India for trading operations. The LO was acting as purchasing agent for the various affiliates who were the actual buyers. The LO as the purchasing agent placed the orders and provided details such as the quantity, price, affiliate to whom the invoice was to be issued and shipping destination;
 - The LO derived its agency income by helping its affiliates procure goods for the purpose of sale. It did not in any way communicate with the manufacturers other than ensuring that the goods were manufactured in accordance with the approved samples provided. The LO only supervised the manufacturing operations as an agent of the various affiliates; and
 - The LO did not in any way represent the local manufacturer and was not an agent of the local manufacturers. The activity of the LO was therefore well within the limits prescribed by the RBI and its activity was strictly to purchase on behalf of its affiliates located outside India. The LO acted only as buyers' agent and should not be considered a PE under Art. 5 of the tax treaty.

- Accordingly, the ITAT concluded that the LO was not involved in carrying out any trading or commercial activities in India, and it did not generate any income in India.

Use of low-tax jurisdictions by television and film production companies investigated

- It has been reported that the Indian tax authorities are investigating the use of low-tax jurisdictions by television and film production companies in order to avoid taxes in India.
- The use of such jurisdictions came to light when a Cyprus-based company applied for permission to pay a Mauritius-based company for the worldwide rights to an Indian movie, without the need to withhold tax in India because the transaction was between companies outside India. Both the Cyprus and the Mauritius company, through a series of holding structures, are owned by Indian interests. The Mauritius company had acquired the rights to the movie from an Indian company and sold such rights to the Cyprus company for a profit, and the Cyprus company sold the distribution rights to a related company in India.
- The tax authorities held that it was required to withhold tax on the payment to be made to the Mauritius company because the profits were generated through business done in India. The tax authorities based this order on the fact that the Mauritius company, at several stages, was connected with the various Indian entities involved in the production and distribution of the movie, and due to this involvement, there was a business connection in India (and possibly even a permanent establishment).
- The tax authorities also issued a second order stating that the Cyprus company was also liable to tax in India on the income arising from the distribution of the movie in India on the basis that there was a clear business connection in India between the Cyprus company through its association with the Network. Additionally, the tax authorities imposed tax at the higher domestic rate instead of the lower rate contained in the applicable tax treaties.

International Tax Developments

- USA. The Indian Authority for Advance Rulings (AAR) delivered a ruling dated 28 July 2008 in the case of the Applicant, i.e.

Airports Authority of India (2008 TIOL 1ARA IT) on whether payment to a foreign company for software was taxable in India as “royalty”. It concerned the delivery of a “Surveillance Situation Display Data” (SSDD). Under the contract, the US company was to deliver the SSDD to the Applicant together with the applicable software, hardware, technical documentation and relevant training in addition to installing and testing the system. The Applicant had also entered into another contract with the US company to supply software and related servers in connection with the modernization of air traffic services in the cities of Delhi and Mumbai. All the activities under both contracts were to be performed in such a manner that the risk and title in the property would pass to the Applicant outside India and the entire activities under the contract were to be performed outside India (with the exception of some support activities relating to installation, site inspection, testing and training which were to be rendered in India). The US company would grant a non-transferable, non-exclusive and royalty-free licence to the Applicant for the use of the software and technical operating manual. The Applicant would not have any rights to make copies of the software or to commercially exploit the software. Furthermore, the contracts stipulated that the consideration for any patents/copyright/etc. owned by the US company and contained in the system/device to be provided under the contracts would be deemed to be part of the purchase price. The issue before the AAR was whether the payments to the US company were liable to tax in India. The AAR ruled that payments received by the US company in respect of software, training and installation/testing services would be taxable in India under the Indian Income Tax Act (ITA) read with the India-US tax treaty (the Treaty). The AAR ruled that Raytheon had not transferred the ownership in the software and technical documents to the Applicant and the fact that the contract price included consideration for patents/copyright/etc. owned by the US company meant that the licence was not royalty free. Under the contracts in question, the US company had only given the Applicant the right to use them for the purpose and in a manner provided for in the contracts. Both the ITA and the Treaty define “royalty” to include consideration for the use of or the right to use any copyright of a scientific work, etc. As such, the income attributable to the supply of the software and technical documents was in the nature of “royalty” under Sec. 9(1)(vi) of the ITA and Art. 12(3) of the Treaty. The AAR also rejected the Applicant’s reliance on the Commentary to the OECD Model Convention with regard to the income from the

sale of copyrighted articles not being treated as “royalty”. The AAR stated that Art. 12 of the Treaty differed from the OECD Model Convention and that there were differences of opinion even amongst OECD member countries on the applicable paragraphs of the Commentary.

- Singapore. The Indian Authority for Advance Rulings (AAR) delivered a ruling dated 4 July 2008 in the case of Cushman & Wakefield (S) Pvt. Ltd. (2008-TIOL-08-AAR) on whether referral fees paid to an overseas group company for referring potential clients to an Indian group company was taxable in India either as royalty or as fees for technical services (FTS).
- Kuwait. The first-time income tax treaty between India and Kuwait, signed on 15 June 2006, entered into force on 17 October 2007.

Indonesia

Tax reform proposals approved by Parliament

- The Indonesian parliament on 2 September approved the government’s proposed income tax bills, which will reduce income tax rates in accordance with the applicable income tax rates in adjacent countries. The law will come into force as of fiscal 2009.
- The new flat income tax rate for corporate taxpayers is 28% for fiscal 2009 and 25% for fiscal 2010 and thereafter. Further, corporate taxpayers that become public companies will be given a reduction of 5% from the normal income tax rate if they have a diversified public ownership of at least 40%. Small, medium, and cooperative enterprise corporate taxpayers will be given an incentive in the form of a 50% reduction of the normal income tax rate. Withholding tax on any taxable service provided by a corporate taxpayer is reduced from 15% of the estimated net income to 2% from the gross amount.
- The new flat income tax rate for corporate taxpayers is as follows:

Fiscal Year	Income Tax Rate
2009	28%
2010 and thereafter	25%

- Corporate taxpayers that become public companies will be given a reduction of 5% from the normal income tax rate if they have a diversified public ownership of at least 40%. Small, medium, and cooperative enterprise corporate taxpayers will be given an incentive in the form of a 50% reduction of the normal income tax rate. Withholding tax on any taxable service provided by a corporate taxpayer is reduced from 15% of the estimated net income to 2% from the gross amount.
- The active business requirement for a corporate taxpayer that wishes to have an income tax exemption over dividends it receives is no longer applicable.
- The new progressive income tax rate structure for individual taxpayers, reduced from five tiers to four, is as follows:

Annual Taxable Income	Income Tax Rate
IDR 1 up to IDR 50 million	5%
IDR 50 million up to IDR 250 million	15%
IDR 250 million up to IDR 500 million	25%
Above IDR 500 million	30%

- Non-taxable income will be increased from IDR 13.2 million to IDR 15.84 million for an individual, and the non-taxable income for each eligible dependent family member will be increased from IDR 1.2 million to IDR 1.32 million for a maximum of three dependent family members. If a spouse earns taxable income and income is combined, an additional IDR 13.2 million of non-taxable income is allowed.
- Dividend income that is subject to the normal progressive income tax rate up to 35% will be taxed at a 10% final tax rate. The rate on income tax instalments for some individual taxpayers is reduced from 2% to 0.75%.
- Exit tax exemption will be given to individual taxpayers who have taxpayer code numbers. Exit tax will be completely revoked as of fiscal 2011. Currently, taxpayers must pay in advance an exit tax ranging from IDR 500,000 to IDR 1 million.
- Taxpayers without taxpayer code numbers will be subject to withholding tax at a 20% to 100% higher rate than those with taxpayer code numbers.

- The new income tax law introduces the profit-split method and transactional net margin method for transfer pricing calculation in addition to the existing comparable uncontrolled price method, resale price method, and cost-plus method.
- The new income tax law also introduces the look-through principle for special purpose vehicles purchasing assets in Indonesia when there is a special relationship between the parties.
- The determination of the beneficial owner of a non-resident taxpayer is further clarified and requires more than a certificate of residence. The resident country of a corporate taxpayer is deemed to be the resident country of the shareholders (jointly or severally) holding a 50% or greater shareholding or the taxpayer's place of effective management.
- Deductible expenses for charitable donations are expanded to include contributions for national disasters, social infrastructure, scholarships, research and development in Indonesia, sports development, and mandatory religious donations.
- Exemptions of taxable incomes are expanded to include surplus income earned by non-profit institutions or organizations engaged in the education or R&D field if it is reinvested within four years from when it is generated, scholarships and compensation received from the Workers Social Security Program.
- Under the new income tax law, surplus from the Central Bank (Bank Indonesia), gains from the transfer of mining concessions, profits from syariah-based businesses, and income from derivative transactions are confirmed as taxable. Also, forestry companies may claim deductions for reforestation, and wastewater treatment companies may claim deductions for the closure and maintenance of wastewater treatment centers.

Beneficial ownership

- The tax authorities issued circular SE-03/PJ.03/2008 on 22 August 2008 on their interpretation of the phrase "beneficial ownership" for tax treaty purposes. The issuance of this circular revokes circular SE-04/PJ.34/2005 on the same matter.
- Both circulars provide that the "beneficial owner" is the real owner of income in the form of dividend, interest and/or royalty

income, with full rights to directly enjoy the benefits of the income. In addition, a non-resident taxpayer who seeks treaty relief under an applicable tax treaty with Indonesia must have a valid certificate of domicile in order to qualify. Unless both these requirements are met, tax must be withheld at the domestic rate of 20%.

- The new circular is silent on the status of special purpose vehicles as beneficial owners. However, in contrast to the old circular, SE-03/PJ.03/2008 no longer cites special purpose vehicles as an exclusion from the definition of a beneficial owner. Further guidance on the prevention of treaty abuse will be covered under a separate circular, which has yet to be issued to date.

Trading representative offices

- The tax authorities issued Circular Letter SE-2/PJ.03/2008 on 31 July 2008 to clarify the application of tax treaties in calculating the branch profits tax rate applicable to representative offices engaged in trading activities.
- Trading representative offices are currently taxed on 1% of their gross export proceeds, at a final tax rate of 0.44% comprising corporate income tax and branch profits tax. The circular clarifies that if an applicable tax treaty stipulates a lower branch profits tax rate than the domestic rate of 20%, the treaty rate applies in arriving at the final tax rate, as exemplified below.
- Without treaty relief:

Corporate income tax $30\% \times 1\%$ of gross exports = 0.30%
Branch profits tax $20\% \times (1\% - 0.3\%) = 0.14\%$
Final tax rate = 0.44%

Pursuant to Art. 10(5) of the Indonesia-Germany tax treaty:
Corporate income tax $30\% \times 1\%$ of gross exports = 0.30%
Branch profits tax $10\% \times (1\% - 0.3\%) = 0.07\%$
Final tax rate = 0.37%

Withholding tax for government bond discounts

- Indonesia has amended the regulation on withholding tax on short-term government bond discounts by issuing Government Regulation 27 of 2008, which revokes Government Regulation 11 of 2006.

- The new regulation, issued 8 April, expands the definition of the term “discounts” from the positive difference between the amount of bonds at the maturity date and the amount of bonds at the initial issuance date to the positive differences between the amount of bonds at the maturity date and the acquisitions cost of the bonds at the initial offering or secondary market, or between the selling price of bonds at the secondary market and the acquisition cost of the bonds at the initial offering or secondary market.
- The party that should withhold the tax is also changed from Indonesian Central Bank (Bank Indonesia) to the issuer or appointed custodian who acts as paying agent for any discounts earned by the bondholders at the maturity date of the bonds, or to a securities company or bank acting as intermediary trader or purchaser for any discounts earned by the bondholders from secondary market trading.
- Under the new rule, the following parties are exempt from the withholding tax:
 - banks incorporated in Indonesia or foreign banks in Indonesia;
 - pension funds the incorporations of which have been approved by the minister of finance; and
 - mutual funds listed in the capital market -- the Financial Institution Supervisory Board -- during the first five years after incorporation.

Indonesia issues new tax rules for construction services

- Indonesia on 20 July issued Government Regulation 51 of 2008, which provides the final income tax rates for construction services. GR 51 replaces Government Regulation 140 of 2000 (GR 140), and its provisions will apply as of 1 January 2008. GR 51 provides that small-scale enterprises performing construction are taxed at 2% and those classified as construction businesses are taxed at 4%. All other construction companies will have their services taxed at 3%.
- Planning and supervising construction services are taxed at 4% for providers classified as businesses and 6% for those classified as non-businesses. Service providers must keep a separate record for expenses incurred from business other than construction service.

- GR 51 also applies to a permanent establishment running a construction service business and confirms that the branch profits tax of the PE running the construction service is not affected by the regulation. Also, outstanding fiscal losses of the construction service company may no longer be used as of the 2009 fiscal period.
- Any construction service contracts signed before 1 January 2008, that terminate by 31 December 2008, will be subject to GR 140, while construction service contracts terminating after 31 December 2008, will be subject to GR 51.

VAT refund, luxury tax increase

- Indonesia's parliament is reportedly considering legislation that would create a VAT refund scheme for foreign visitors making certain purchases from qualifying merchants and that would increase the current ceiling on the luxury sales tax from 75% to 200% to help offset the loss in VAT revenue.

Record prices put heat on Indonesia's coal industry

- With energy and commodities prices rising dramatically during the past year, Indonesia's coal industry has been at the center of disputes with the government over VAT and royalty payments and transfer pricing.

Business mergers

- "Business purpose" test is required to be satisfied for transfer of assets at tax book value in a business merger, consolidation or expansion. The tax authorities released the Regulation of the Director General of Taxation No. PER-28/PJ./2008 dated 19 June 2008 setting out details of the "business purpose" test which must be met by taxpayers who wish to apply the book value of assets that are transferred as part of a business merger, consolidation or expansion.
- An application for the use of the assets' book values must be submitted to the Director General, who would refer to the following criteria in deciding whether or not the "business purpose" test is met:
 - the objective of the business merger or expansion is to create business synergy, strengthen capital structure and not to avoid tax;

- the business activities of the liquidating company continue to be carried on until the effective date of the merger;
- the surviving entity continues its business activities and the business activities of the liquidating entity for at least 5 years from the effective date of the merger or expansion; and
- assets owned by the surviving entity are not transferred within 2 years after the effective date of the merger or expansion. However, an application can be submitted to the Director General for the waiver of this requirement where it can be evidenced that the sale of the company's assets is beneficial towards enhancing corporate efficiency.

- The above mentioned Regulation is effective 19 June 2008, and failure to comply would result in the recalculation of the transfer value of assets based on their market value instead of their book value. The difference between the market value and book value of the assets would then be subjected to normal corporate tax rates, which are currently applied progressively from 10% to 35%.

International Tax Developments

- Finland. The new agreement on the promotion and protection of investments between Finland and Indonesia, signed in Helsinki on 12 September 2006, entered into force on 2 August 2008 and is effective from the same date. This agreement replaces the investment promotion and protection agreement signed by the two states on 13 March 1996. The new agreement was ratified in Finland by a law of 26 October 2007; the entry into force was announced by a presidential decree of 18 July 2008.

Japan

Proposal for exemption of foreign subsidiary earnings

- In the previous edition of the Asia News Letter, we mentioned that plans existed to introduce an exemption from tax for dividends received by Japanese companies from their overseas subsidiaries. On 22 August a report was published by the Ministry of Economy, Trade and Industry (**METI**). The report

recommended amongst others to exempt income from foreign subsidiaries provided that certain conditions were met (e.g. an interest of 25% or more for at least 6 months). A credit for (withholding) taxes levied would then no longer be available. Amongst other given the current political turmoil in Japan, it is uncertain if and when the suggested amendments will be enacted.

Clarification on agent PE

- Under the 'old' domestic rules, an independent agent (IA) would constitute a permanent establishment (PE) for Japanese tax purposes. As mentioned in the previous Asia News Letter, Japan amended the domestic rules now excluding an IA from the definition of a PE. The amendment should stimulate the onshore investment management activities. Recently, guidance is given on when an investment manager would be regarded as an IA, e.g.;
 - legal and economic independence; and
 - acting in the ordinary course of business for the (offshore) fund.
- An investment manager is not deemed to be an IA if amongst others they are exclusively involved with that offshore fund, a substantial part of its personnel is the same as that of the offshore fund or if the only act on the instructions of the offshore fund manager.

Income tax

- The recently elected Taro Aso suggested to cut taxes. Amongst others, he indicated to reduce the effective CIT rate from 40% to 30%. Currently, Japan has the highest CIT rate within the OECD.

International Tax Developments

- Tax treaties. Japan issued the following list naming the priority countries to conclude/re-negotiate tax treaties with Brunei, Kazakhstan, Kuwait, Oman, Saudi Arabia, EAE, The Netherlands and Barbados.
- Czech Republic. A social security treaty between the Czech Republic and Japan has been signed.

Korea

Tax reductions

- On 4 June 2008, the Korean government announced its "Plan for Improvement of Corporate Business Environment" (the "Plan"). The following provides a summary of the major tax-related items contained in the Plan.

Reduction of corporate income tax rate and adjustment of tax income bracket

- The corporate income tax rate is currently 13% for up to KRW 100 million of tax income and 25% for amounts exceeding that figure. Under the Plan, it is anticipated that the corporate income tax rate will be reduced as summarized in the following table:

Current		
Tax Rate per Tax Income	Up to KRW 100 mil.	13%
	Over KRW 100 mil.	25%

FY 2008 to FY 2009		
Tax Rate per Tax Income	Up to KRW 200 mil.	11%
	Over KRW 200 mil.	22%

From FY 2010		
Tax Rate per Tax Income	Up to KRW 200 mil.	10%
	Over KRW 200 mil.	20%

- The proposed amendment to lower the corporate income tax rate was submitted to the extra-session of the National Assembly held in June 2008, and it is anticipated that the proposed amendment will be promulgated into law in August 2008 in time for the new tax rates to be applicable for the interim corporate tax return for year 2008 (for corporations with calendar year-end).

Introduction of consolidated tax return scheme

- As part of the Korean government's continuing efforts to develop its tax system, the Plan includes a proposal to introduce a consolidated tax return scheme that would allow taxpayers to combine the taxable income of the parent company with its subsidiaries with the tax being levied on the combined taxable income as if they were a single economic entity. The proposed amendment on the consolidated tax return system is expected to be submitted to the regular session of the National Assembly

in September 2008. Although the proposed amendment has not yet been disclosed, it is anticipated that the consolidated tax return scheme will take effect starting from 1 January 2010 and will be applicable to a parent company and its wholly-owned subsidiaries.

Extension of carry-forward period for net operating loss

- Under the current tax law, the net operating loss (NOL) of a corporation can be carried forward for 5 years to offset its future taxable income. In order to encourage investment by capital-intensive corporations, the Plan includes a proposal to extend the NOL carry-forward period. The proposal is considering an extension from the current 5 years to 7 years for certain limited industries which require substantial capital expenditure. The proposal is expected to be submitted to the regular session of the National Assembly in September 2008. If implemented, it may take effect starting from 1 January 2009.

Proposal to reduce the withholding tax rates

- In addition to the gradual reduction of the corporate income tax rate, the Korean Ministry of Finance and Strategy also intends to reduce the withholding tax on interest and dividends from the current 25% to 20%. Obviously, the rates could be further reduced under applicable tax treaties. The withholding tax rate reduction is part of a more comprehensive plan that should achieve a boost to the Korean economy.

International Tax Developments

- Kuwait. The protocol to the treaty with Kuwait was published. Key amendments are that the withholding tax rate on qualifying dividends and interest is reduced from 10% to 5%.

Malaysia

Malaysia released its Budget proposals for 2009 with the following highlights:

Transfer pricing rules proposed

- Transfer pricing guidelines were introduced in Malaysia in 2003 and took effect under the general anti-avoidance provision

in Sec. 140 of the Income Tax Act, 1967 (ITA). Due to the weakness in the use of Sec. 140 to deal with transfer pricing issues, a new provision, Set. 140A will be introduced in the ITA to specifically address transfer pricing. The new provision is focusing on the “supply of property or services” while it is still unclear whether interest free loans could be included in “property or services” since there is no definition of “property or services”.

Thin Capitalization rules proposed

- The new provision, Set. 140A also adopts thin capitalization rules. A deduction for interest will be denied in respect of interest paid to associated companies for “financial assistance” if certain criteria and conditions are met. The Inland Revenue Board (IRB) is expected to issue guidelines before the end of 2008 to set out implementation rules of the thin capitalization provisions.

Group Relief

- Tax treatment on group relief be enhanced by allowing losses for the purpose of offsetting be increased from 50% to 70%, effective from YA2009.

Withholding tax

- Non-residents will now be subject to withholding tax of 10% in respect of “gains or profits” under Section 4(f) of the ITA. Section 4(f) covers “gains or profits” which do not fall within the other classes of taxable income (under Section 4 of the ITA). The examples given in the Budget proposals include commission fees, guarantee fees and introducer's fees paid to non-residents.
- To make investments in REITs more attractive, the rate of withholding tax on REIT distributions to foreign institutional investors will be reduced from 20% to 10%, while distributions to non-corporate investors (which would include resident and non-resident individuals) will be reduced to 10% from the current rate of 15%. Distributions to non-resident companies will continue to attract withholding tax at the prevailing corporate tax rate.

Personal Tax

- The tax rates of the top bracket of the personal income tax have been reduced from 28% to 27%. Furthermore, the 13% bracket will be reduced from 13 to 12%.

Capital Markets

- There continue to be incentives for the Islamic sector. The Budget proposals provide for tax exemption on fees earned by approved institutions from the arranging, underwriting and distribution of non-ringgit Sukuk (i.e. Islamic bonds) issued in Malaysia and distributed outside Malaysia as well as on profits received from the trading of non-ringgit Sukuk in Malaysia.

Labuan offshore companies

- The Malaysian Internal Revenue Board has issued guidelines on the new option for Labuan offshore companies to be taxed under Malaysia's Income Tax Act 1967 in addition to the existing option to be taxed under the Labuan Offshore Business Activity Tax Act of 1990.
- The relevant provisions under the ITA and the Labuan Offshore Business Activity Tax Act 1990 (LOBATA) have been amended as follows:
 - a) Section 3B of the ITA allows an offshore company which has made an election under section 3A of the LOBATA to be charged to tax in accordance with the ITA in respect of its offshore business activity; and
 - b) Section 3A of LOBATA allows an offshore company carrying on an offshore business activity to make an irrevocable election in the prescribed form. Upon that election, any profit of the offshore company in respect of the offshore business activity for a year of assessment and subsequent years of assessment will be charged to tax in accordance with the ITA.
- Offshore companies carrying an offshore business activity shall be subject to tax under the LOBATA in respect of that offshore business activity. Beginning from YA 2009, such offshore companies may make an election to be taxed under the ITA. The election shall be made and furnished to the Director General of Inland Revenue (DGIR) within three (3) months after the beginning of the basis period for a year of assessment. In accordance with the LOBATA, the said basis period refers to the accounting period or periods ending in the immediately preceding calendar year.
- An offshore company which makes an election under section 3A of the LOBATA will be charged to tax in accordance with the ITA. In the case of an offshore company which is resident in Malaysia;
 - a) carrying on the business of banking, insurance or sea or air transport for the basis year for a year of assessment, such company will be taxed on income from wherever derived i.e., he is chargeable to tax on his world income; or
 - b) carrying on other than the business mentioned in paragraph 7(a) above, such company will be taxed only on income accruing in or derived from Malaysia.
- Income of any person other than a resident company or an offshore company that has made an election under section 3A of the LOBATA carrying on the business of banking, insurance or sea or air transport for the basis year for a year of assessment derived from sources outside Malaysia and received in Malaysia shall be exempt from tax.
- On 31 July 2008, the Labuan Offshore Financial Services Authority (LOFSA) announced that automatic approval is granted to Labuan Offshore Companies (LOC) which:
 - carry on business with Malaysian resident according to Sec. 7(3)(a) of the Offshore Companies Act 1990 (OCA);
 - invest in a domestic company pursuant to Sec. 147(1) of the OCA; and
 - wholly own a domestic company to carry on offshore business.
- In order to get the automatic approval, the LOCs must:
 - submit a notification in the prescribed form no later than 10 working days from the date the transactions is carried out; and
 - obtain the necessary approvals (where applicable) from the relevant domestic regulatory authorities including the Central Bank of Malaysia, Securities Commission and Foreign Investment Committee.
- The lodgement fees for several forms and documents are no longer required to be submitted by the LOC after incorporation.

Windfall profits levy

- Malaysia introduced the windfall profit levy on electricity with effect from 1 July 2008. A levy is imposed on producers of electricity with an installed capacity of at least 30 megawatts, and who is party to a power purchase agreement with any supply authority. The levy is charged on any return on assets of the producer of electricity which exceeds 9% for each financial year calculated in accordance with a prescribed PBIT/FA formula.
- Malaysia introduced the windfall profit levy on oil palm fruit with effect from 15 July 2008. Oil palm fruit producers who own oil palm holdings, which amount to not less than 40.6 hectares or 100 acres in aggregate, are required to pay a windfall profit levy in respect of oil palm fruit produced to the Customs and Excise Department.

International Tax Developments

- Denmark. The protocol to the income tax treaty between Malaysia and Denmark signed on 3 December 2003, entered into force on 17 January 2005. The protocol generally applies from 1 January 2006.

Philippines

Tax rulings on reorganization involving shareholding in Philippine companies

- According to the rulings issued by the Bureau of Internal Revenue, the transfer by a foreign parent company to a foreign subsidiary of its shares of stock in a wholly-owned domestic subsidiary as additional capital contribution, and the subsequent transfer of the same shares by the foreign subsidiary to another foreign subsidiary as additional capital contribution pursuant to a global reorganization, are not subject to capital gains tax (CGR) and donor's tax because since there is no transfer of beneficial ownership outside the group. The transfer is in effect a legitimate corporate reorganization without consideration. The reorganization is subject to documentary stamp tax (DST).
- According to the rulings issued by the Bureau of Internal Revenue, the transfer of shares of stock in a domestic company pursuant to a merger effected abroad is not subject to CGR and DST.

Singapore

New Circular on Transfer Pricing Consultation program

- On 31 July 2008, the IRAS issued a new tax circular in which it announced that it will conduct transfer pricing consultation ("TPC") with selected taxpayers 'to further assist them in their compliance with the arm's-length principle in their related-party transactions'. A revised circular was issued on 6 August 2008, which includes a copy of the questionnaire that will be sent to selected taxpayers who appear to have many related-party transactions, especially with overseas parties.
- With this new circular the IRAS highlights once more the importance for tax payers to apply the at arm's length principle and to prepare and maintain proper documentation. The IRAS announced that it will monitor the ease and level of compliance by taxpayers with the transfer pricing guidelines by sending out the above mentioned questionnaire in which the taxpayer is required to provide information regarding their activities, group structure, types and values of transactions with related parties, the extent of documentation maintained, etc. Based on the questionnaire the IRAS will assess if a TPC will be undertaken.

Equity Remuneration Incentive Scheme (Start-Ups)

- On 1 August 2008, the Inland Revenue Authority of Singapore (IRAS) published a circular which provides detail rules of the equity remuneration incentive scheme for start-up companies for the period 16 February 2008 to 15 February 2013. Under the Equity Remuneration Incentive Scheme (start-ups) (ERIS (Start-Ups)), an employee of a qualifying start-up company can be granted a tax exemption of 75% of up to S\$10 million of gains from employee stock option (ESOP) plans or employee share ownership (ESOW) plans over a 10-year period, subject to certain criteria.
- It is noted that the ERIS is available only in respect of ordinary shares and excludes Group ESOP or ESOW plans operated by the parent company of a qualifying company. In addition, the ERIS schemes for start-ups, small and medium sized

enterprises and all other corporations are mutually exclusive such that a company may, at any one time, avail itself to only one of the schemes in respect of their ESOP or ESOW plans.

- Qualifying criteria for ERIS (Start-Ups). An ESOP that has met the vesting period requirement as prescribed for companies listed on Singapore Exchange (SGX) qualifies to be an ERIS (Start-Ups) plan. An ESOW plan must meet the minimum holding period before it can qualify as an ERIS (Start-Ups) Plan.
- A qualifying company must grant ESOPs and ESOWs within the first three years of its incorporation, its market value must not exceed S\$100 million at the time of grant of the options or shares, and it must be incorporated and carrying on business activities in Singapore. Moreover, it must have a total share capital which is beneficially held directly by no more than 20 shareholders which should be all individuals or of which at least one is an individual holding more than 10% of the total number of issued ordinary shares of the qualifying company.
- A qualifying employee is an employee (excluding a non-executive director) who has been granted stock options under an ESOP plan, or shares under an ESOW plan by a qualifying company provided that he is exercising employment for the qualifying company, working work at least 30 hours per week and does not have effective control of the company at the time of the grant of options or shares.

International Tax Developments

- Singapore and Uzbekistan signed a first-time income tax treaty on 24 July 2008. The treaty *inter alia* contains favourable withholding tax rates. The maximum rates of withholding tax are: 5% on dividends, 5% on interest and, 8% on royalties.

Taiwan (R.O.C)

Treatment of foreign tax-residents clarified

- On 13 August 2008, Ministry of Finance issued an explanatory letter (Tai-Cai-Shui 09704542390) to clarify how the personal income tax (PIT) will be levied on foreign R.O.C. tax residents. The tax treatment for foreign non-residents remains the same.

- According to previous practice foreign R.O.C. tax residents are required to file PIT returns for their income from the previous year. If they continue to stay in Taiwan the next year, regardless of the number of days, they also were required to file returns for the income they earned in that year. The new explanatory letter clarifies that, although foreign R.O.C. tax residents must file an annual PIT return, it does not mean that they will be taxed as tax residents. The PIT tax liability should be calculated in accordance with the R.O.C. income tax law which means the taxation of foreign individuals depends on the number of days they stay in Taiwan. If a foreign R.O.C. tax resident stay in Taiwan for less than 183 days in the second year, he will be taxed as a non-resident (20% withholding tax).
- Additionally, the explanatory letter states that employers must have full knowledge of their foreign employees' PIT status.

Thailand

Deductible investment losses clarified

- Departmental Instruction No. Paw. 135/2551(2008) was released on 8 August 2008 to clarify the deductibility of investment losses where a parent company, which is also the creditor of its subsidiary, subscribed for new shares issued by its loss-making subsidiary.
- According to Paw. 135/2551 (2008), the amount of subscription for new shares, which is not refunded to the parent company and does not exceed the amount of debts that the subsidiary owes to that parent company, is deductible as a tax expense, provided that:
 - the subsidiary is dissolved and liquidated within the accounting year that follows the accounting year in which the new shares are issued;
 - the parent company holds more than 25% of the subsidiary's shares with voting power from the time of its incorporation until the issuance of the new shares;
 - the debts that the subsidiary owes to the parent company are not prohibited as a deduction if they become bad debts; and

- there are no means available to the parent company to recover the losses incurred from the subscription in the new share.

Application of 7% VAT rate extended

- The application of 7% VAT rate is extended until 30 September 2010 pursuant to the Royal Decree (Vol.479) issued on 17 August 2008. The VAT rate was reduced from 10% to 7% by a Royal Decree (Vol.465), which would expire on 30 September 2008.

Reduction of corporate income tax rate for listed companies

- Royal Decree (Vol. 474) was issued on 29 July 2008 to extend the period during which a company newly listed on the Stock Exchange of Thailand (SET) or the Market for Alternative Investment (MAI) may apply for a tax incentive under the Royal Decree (Vol. 467).
- As a result, the reduced corporate income tax rates of 20% for a company newly listed on the MAI and 25% for a company newly listed on the SET, applicable for the first 3 accounting years commencing on or after the listing, would apply if the application for listing is submitted from 1 January 2007 to 31 December 2008 and the listing is completed before 31 December 2009.
- The Royal Decree (Vol. 475) was issued to reduce the corporate income tax rate for companies listed before 7 August 2008 that have never applied the incentive under the Royal Decree (Vol. 467) or tax incentives under the Royal Decree (Vol.460) which provided for an exemption for
 - 25% of the expenditures spent in the expansion or improvement of assets utilized in a project with minimum value of THB 5 million and
 - the proceeds from sale of machinery spent in purchasing the replacement machinery.
- The reduced rates are 20% on the first THB 20 million of net profits for companies listed on the MAI and 25% on the first THB 300 million of net profits for companies listed on the SET for 3 accounting years commencing on or after 1 January 2008.

Vietnam

Decree on Personal Income Tax Law

- Decree No. 100/2008/ND-CP has been issued to implement the Law on Personal Income Tax and regulate tax registration, declaration and payment in line with the Law on Tax Management. According to the decree, there are 10 kinds of taxable incomes, including incomes from salaries and wages; business and production; capital investment; transfer of capital and real estate; lottery winnings; copyright; franchise activities; inheritance and gifts which are securities, capital or assets that must be registered.
- The decree regulates a progressive tax regime for income from businesses, wages and salaries. The lowest tariff is 5% imposed on incomes of between VND4 million and under VND5 million (US\$294) per month and the highest rate is 35% levied on monthly income of over VND80 million (\$4,700).
- Similar to the current PIT rules, taxpayers shall include residents and non-residents. Besides the rule of 183 days present in Vietnam, residents are now broadly defined to include any of those having permanent residency in Vietnam or entering into a house leasing agreement in Vietnam with a term of 90 days or more in a tax year.
- The Decree will take effect of 1 January 2009.

Deadline for re-registration of foreign invested enterprises not extended

- According to the Law 60-2005/QH11 on Enterprises dated 29 November 2005 (LOE) and Decree 101/2006/ND-CP dated 21 September 2006 (Decree 101), the deadline for the 're-registration' of companies with foreign owned capital established under the old laws regulating foreign investment was 30 June 2008. It was expected that the deadline would be extended but it turned out that no extension was granted.
- The re-registration is not compulsory, but re-registering involves replacement of the existing investment license with a new investment certificate issued under the LOE. Under the LOE, foreign invested companies electing not to re-register must continue to operate in accordance with their investment license

and charter (although the legislative foundation for these documents has been removed). They will, however, be barred from amending their authorized scope of activities (as set out in their investment license) or the licensed duration of their investment project. It is unclear how the above will work in practice.

HOSE Disclosure Requirements

- Under Decision 09-2008-QD-SGDHCM of the Ho Chi Minh City Stock Exchange (HOSE) dated 20 March 2008 (Decision 09), HOSE has issued regulations on disclosure requirements for companies listed on the HOSE, trading members of the HOSE, public fund management companies, public securities investment companies and certain “internal” and “major” shareholders. Companies listed on the HOSE must disclose the occurrence of key events within 72 hours. Key events include key resolutions of the Board of Management relating to charter capital or substantial investment by the organization in another organization, and change to key personnel. In addition, listed entities are also required to make disclosure within 24 hours of any information requested by the State Securities Commission (SSC).

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