

IRAS issues guidance on COVID-19 related tax measures

Background

The COVID-19 pandemic has severely disrupted our global economy. As part of the Resilience Budget, Solidarity Budget and Fortitude Budget announced by the government, the Inland Revenue Authority of Singapore (“IRAS”) has introduced a series of support measures to help taxpayers ease their cash flow.

In addition, the IRAS has issued various tax guidance to provide tax certainty to taxpayers during this period of uncertainty, ranging from income tax treatment of COVID-19-related payouts to businesses and individuals, tax residence status of a company and permanent establishment (“PE”), Goods and Services Tax (“GST”), property tax rebate and rental relief framework, amongst others.

This alert summarises the most recent tax guidance for transfer pricing (“TP”), tax residence, PE and GST matters which have been issued by the IRAS. This tax guidance is elaborated as follows.

Transfer Pricing

The TP Guidance was delivered in a Question-and-Answer (“Q&A”) format and set forth five Q&As to clarify 1) TP documentation; and 2) Advance Pricing Arrangements (“APAs”) with the IRAS.

1) TP Documentation

Substantiating arm’s length nature of transfer pricing outcome

For businesses that are severely affected by COVID-19, the IRAS recommends that the following information be included in the TP documentation (where applicable) to substantiate the arm’s length outcome of any related party transactions:

- » A broad analysis of how the taxpayer’s industry has been affected by COVID-19 and the direct impact of COVID-19 on the taxpayer company;
- » Documentation of who and which entity within the group made decisions relating to management of risks relating to COVID-19. This information will help to indicate which entities are in control of the decisions and thus should bear the related risks;
- » The functional analysis of the taxpayer company and the related parties before and after COVID-19 (i.e. any re-allocation of functions, assets and risks, as well as any recharacterisation);
- » The contractual arrangements between the taxpayer company and its related parties, highlighting whether any obligations or material terms and conditions have been varied, amended or terminated in light of COVID-19;

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- » A comparison of the budgeted (pre-COVID 19) and actual results of the profit and loss analysis of the taxpayer company, providing explanation and evidence to support the variances;
- » Reasons and supporting evidence to justify how the taxpayer company's profitability has been negatively impacted by COVID-19; and
- » Details relating to COVID-19 specific government assistance that the taxpayer company has received, or government regulations imposed on the taxpayer company which have an impact on its operations.

In summary, the IRAS expects taxpayers to provide evidence that illustrate the adverse financial impact of COVID-19 on the taxpayer company relative to pre-COVID projections. It is noteworthy that details on government assistance measures have been requested. This raises the question as to the position that the IRAS may take or adjustment(s) (if any) that the IRAS may require taxpayers to make when factoring in these assistance measures.

One-off Acceptance of Term-Testing over Annual Testing

To spread out the negative impact brought by COVID-19 for the Year of Assessment ("YA") 2021 over a longer period, taxpayers are allowed to apply term-testing (generally over three years) to support its transfer pricing outcome. The IRAS has highlighted that this is a one-off concession for YA 2021 due to the exceptional nature of COVID-19. Under usual circumstances, taxpayers are required to consult with the IRAS before applying term-testing.

In the application of term-testing, taxpayers are expected to document the impact of COVID-19 and explain within its transfer pricing documentation how term-testing is applied. A numerical worked example is provided in the IRAS guidance to illustrate how a three-year term-test may be applied.

The IRAS also cautioned taxpayers to consider the corresponding impact on and potential disputes arising from term-testing on related parties in other tax jurisdictions, where such an approach may not be acceptable. If term-testing is not allowed in the other jurisdiction where the company's related party is located, this may result in potential disputes. Taxpayers should therefore also consider the corresponding impact of applying term-testing on the related parties when considering this once-off application.

2) APA with IRAS

The IRAS also provided their recommendations to taxpayers who are considering, have applied or have concluded an APA agreement with the IRAS.

Scenario	APA Request / Status	Requirement Details
A	New APA Application / Renewal of APA	<p>For businesses which are not significantly impacted by COVID-19, taxpayers may proceed with a new APA application or request for renewal of an existing APA.</p> <p>Otherwise, taxpayers should consider APA application or renewals only when there is greater level of certainty on the factors which may affect the determination of arm's length transfer prices between related parties.</p>

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B	APA Application under Review	<p>Taxpayers should assess whether there are any transfer pricing implications arising from COVID-19 which may impact the APA application and submit the relevant details to the IRAS. Such implications may include changes in functional profile of covered entities.</p> <p>The IRAS may put on hold or terminate the APA process for cases which have been assessed to contain significant uncertainties.</p> <p>The IRAS and other Competent Authority(ies) will negotiate and agree on a mutually acceptable conclusion for any bilateral/multilateral APA under review.</p>
C	Existing APA in Force	<p>Taxpayers should review and assess whether they continue to comply with the critical assumptions under the terms and conditions in existing APA agreements. If there are any breaches of the critical assumptions, taxpayers should immediately notify the IRAS and provide an analysis of the COVID-19 impact and the company's next course of action.</p> <p>Based on the analysis, the IRAS will evaluate and decide on the best possible outcome, including letting the APA run its usual course, suspending or modifying the APA for the period which is impacted.</p> <p>IRAS and the other Competent Authority(ies) will negotiate and agree on a mutually acceptable conclusion for any existing bilateral/multilateral APA.</p>

Permanent Establishment

Due to widespread travel disruptions brought about by the COVID-19 outbreak, concerns have arisen that a foreign company may inadvertently create a Singapore PE due to the unplanned presence of its employees in the country. As an administrative concession, the IRAS has announced that it will regard a foreign company as not having created a Singapore PE for YA 2021 if the following conditions are satisfied.

- » First, the foreign company must not have had a Singapore PE in YA 2020.
- » Second, the economic circumstances of the foreign company must remain unchanged. The economic circumstances that the IRAS will take into consideration include: (i) the principal activities and business model of the company; (ii) the nature of its business operations in Singapore and elsewhere; (iii) the conduct of its business in Singapore and elsewhere; and (iv) the usual locations where it operates in.
- » Third, the unplanned presence of the foreign company's employees in Singapore must be due to travel restrictions relating to COVID-19 and their physical presence in Singapore must be temporary. In this regard, the employees must generally be in Singapore for no more than 183 days in 2020 in order for their physical presence to be regarded as temporary.

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- » Finally, the employees must not have performed such business activities in Singapore but for the COVID-19-related travel restrictions (i.e. the employees would not have performed business activities in Singapore if there were no travel restrictions in place).

Where the foreign company is able to demonstrate (with the necessary documentation(s)) that these conditions are satisfied, the IRAS will treat it as not having a Singapore PE.

Tax Residence Status of a Company

In Singapore, the tax residency of a company is determined by the place in which the business is controlled and managed. One of the key indicia as to whether the business is controlled and managed in Singapore is whether a Company holds its Board of Directors meetings in Singapore.

Where a company is not able to hold its Board of Directors meetings in Singapore due to the travel restrictions relating to COVID-19, IRAS is prepared to consider the company as a Singapore tax resident for YA 2021, provided that it meets all the following conditions:

- » the company is a Singapore tax resident for YA 2020;
- » there are no other changes to the economic circumstances of the company; and
- » the directors of the company have to attend the Board of Directors meeting held outside Singapore, or held via electronic means (e.g. via video-conferencing, tele-conferencing, etc.), due to the directors being temporarily restricted in their travel as a consequence of COVID-19.

Conversely, where a company is not a tax resident of Singapore for YA 2020, IRAS will continue to consider the company as a non-resident for YA 2021, provided that the company has to hold its Board of Directors meeting in Singapore due to the travel restrictions relating to COVID-19, and there are no other changes to the economic circumstances of the company.

In both of the above instances, the company should keep relevant supporting documentations and records (e.g. board minutes stating why the directors were attending board meetings from their respective locations), and to provide the relevant information to IRAS upon request.

Goods and Services Tax

Finally, the IRAS has provided the following clarifications for the purposes of determining whether input GST can be claimed by an employer in respect of benefits provided to employees during the COVID-19 period.

- » GST incurred on accommodation, food and transportation to and from the accommodation to a testing facility by employees would be claimable as input tax if the employee was issued with a 'stay home notice' order after returning from overseas business trips. To claim input tax, these employees must have been travelling for business – and not for private purposes and must not have been provided with the same accommodation prior to 1 February 2020.
- » GST incurred on accommodation costs in connection with Malaysian workers who normally reside in Malaysia but are required to remain in Singapore for business continuity purposes in light of the Movement Control Order will be claimable as input tax.

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- » GST incurred to provide personal protective equipment to employees for business, and not for personal use, will be regarded as being incurred for business purposes and will be claimable as input tax.
- » GST incurred on certain expenses to facilitate working from home (specifically, utility and telephone bills, and mobile phone and broadband internet subscription fees) by employees (that is subsequently reimbursed by the employer) will be claimable as input tax where the expenses incurred are attributable to business purposes – the portion of the expenses attributable to non-business purposes will not be claimable. Pertinently, the supply must be contracted in the employee's name.
- » GST incurred on office equipment (for example, printer, toner, computer monitor, chair, etc.) purchased by the employer to facilitate working from home will be claimable as input tax if the employer retains legal ownership over the office equipment. Input tax will not be claimable in cases where the office equipment is acquired by the employee, since the purchase will be regarded as having been incurred primarily for non-business purposes given that employees may continue to use the equipment or sell them off after the work-from-home period without having to obtain approval from the employer.

Our Observations

The disruption from COVID-19 presents many novel fact patterns and challenges to the application of the conventional income tax and GST rules. In line with practices in a number of advanced jurisdiction and the OECD, the IRAS has been proactive in providing guidance that have been pragmatic and helpful in providing certainty to taxpayers.

Regarding transfer pricing documentation, the recommendations are generally aligned to industry best practices in documenting extraordinary circumstances and in explaining the variations in profitability. It would be prudent for taxpayers to take heed when preparing their Singapore documentation for YA 2021, including the impact of any term-test applied with the position that an offshore related affiliate may take in regard the same transaction.

With regard to APA arrangements, the key is timely assessment by the taxpayers and early engagement with the IRAS should COVID-19 impact the analysis of any ongoing APA application or with respect to any existing APAs, the any critical assumptions or conditions. For those contemplating an APA, the guidance suggests that it may be prudent to await clarity as to the impact of COVID-19 before proceeding.

With regard to PE, Tax residence status and GST issues, the IRAS guidance provides some much-needed assurance to businesses and employers that their income tax and GST positions remain certain amidst any unplanned COVID-19 disruption.

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