INTERNATIONAL TAX REVIEW™

AUSTRALIA Managing an audit

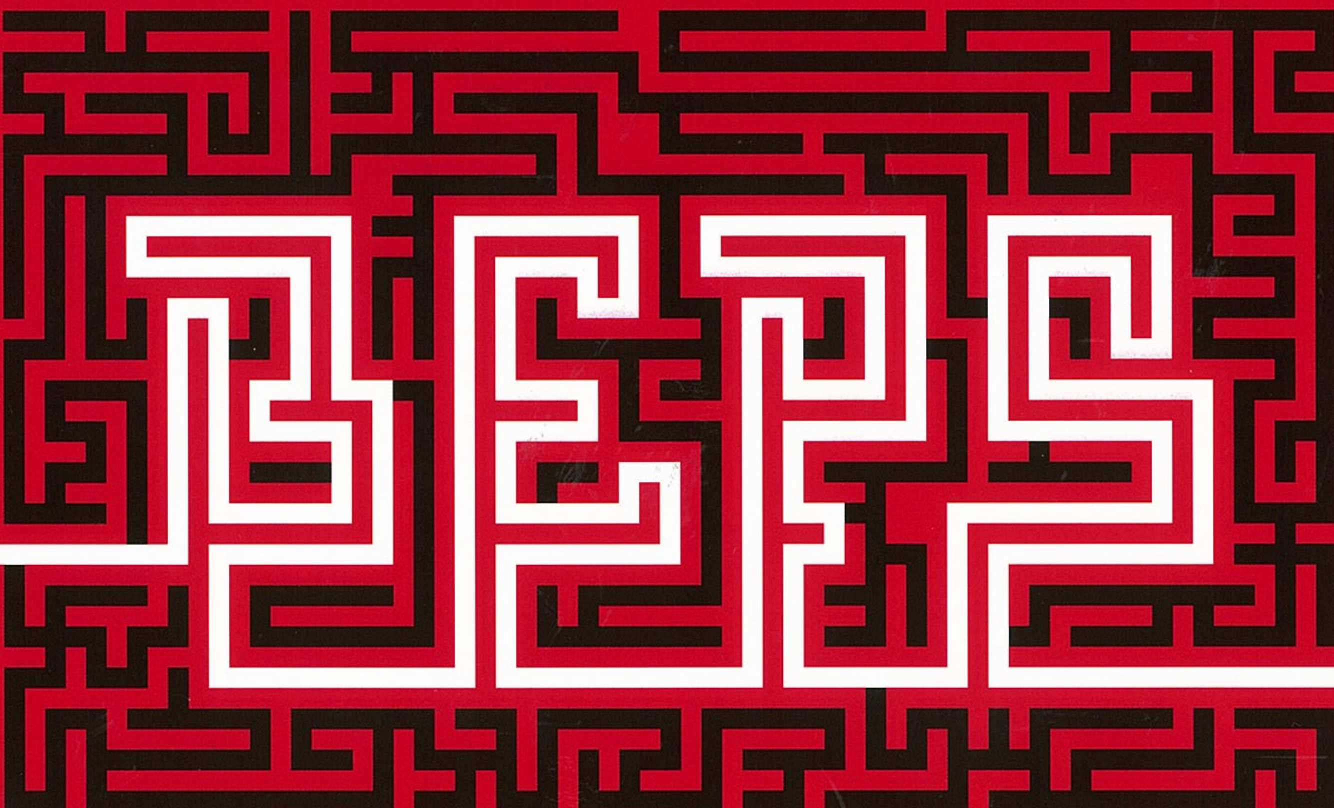
INDIA UN Manual India chapter

OECD Exploring article 8 of the model treaty

US Multistate issues for inbound companies

www.internationaltaxreview.com

September 2013



The BEPS maze

Finding the right way out

PLUS:

BRICs Attracting investment despite their tax systems

INDIA Change of direction or empty promises?

G8 Achieving beneficial ownership goals

SPECIAL FEATURES
Brazil, India, Myanmar, Singapore, Thailand

A look at international tax planning in Myanmar

The opening of Myanmar to the world and its ongoing transition to an open economy has generated a huge amount of interest from multinational companies looking to capitalise on Asia's latest emerging economy. With the entry of multinationals, Jack Sheehan and Bernard Cobarrubias of DFDL look at the renewed interest in cross-border transactions and naturally, international tax planning.

Myanmar has a small tax treaty network with some of its traditional trading partners such as countries in South East Asia and the UK. Following a meeting held in June in Yangon, Myanmar and Hong Kong have expressed intentions to start negotiations for a tax treaty.

Myanmar Income Tax Law and local withholding tax system

The tax laws of Myanmar provide for a system of withholding taxes (WHT) applicable to certain payments depending on their type and the residency of the recipient of the income.

A resident foreigner includes:

- An individual foreigner who resides in Myanmar for more than 183 days during the financial year;
- A company formed under the Myanmar Companies Act or any other existing Myanmar Law, wholly or partly owned by foreign shareholders;
- An association formed wholly or partly with foreigners with its control, management and decision-making activities situated and exercised wholly in Myanmar.

A foreign entity not falling within the above categories is a non-resident foreigner.

For residents the WHT is creditable, while for non-residents it is a final tax. The WHT rates are listed in Table 1.

Table 1

Class of income	Rate applicable to residents	Rate applicable to non-resident foreigners
Royalties paid for the use of licences, trademarks and patent rights	15%	20%
Interest	Not subject	15%
Payment for procurements within the country and work done under a contract or an agreement or any other form of agreement for state organisations, development committees, cooperatives, partnerships, and companies and organisations formed and registered under any existing law	2%	3.5%
Payment for procurements from the country and work done under a contract or an agreement or any other forms of agreement for foreign entrepreneurs or foreign companies	2%	3.5%

Table 2

Country	Construction PE	Service PE
India	270 days	No period defined
Lao PDR	6 months	6 months
Malaysia	6 months	No period defined
Singapore	6 months	6 months
South Korea	6 months	6 months
Thailand	6 months	No period defined
UK	No period defined	No period defined
Vietnam	6 months	6 months

Myanmar's tax treaties

Myanmar has entered into and ratified tax treaties with the UK, Malaysia, Singapore, Vietnam, Thailand, Korea, Lao PDR, and India. It has also entered into double taxation agreements (DTA) with Indonesia, and Bangladesh but those DTAs still await ratification.

Tax treaty exemptions and relief are not automatic and are granted at the discretion of the Internal Revenue Department (IRD). To obtain relief under tax treaties, taxpayers will need to apply administrative procedures with the IRD on a case-by-case basis.

Business profits and permanent establishment

A DTA provides a resident of a treaty country or territory with an opportunity to claim exemption from local (withholding) taxes on business profits. Typically, a resident of a contracting state is not subject to tax on income from business profits in Myanmar if it does not have a permanent establishment (PE) in Myanmar or it has a PE in Myanmar but the income is not attributable to the PE.

A PE means a fixed place of business through which the business of an enterprise is carried on and includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

Myanmar's DTAs vary in how they define service PEs and construction PEs.

Generally, a service PE includes the furnishing of services, including consultancy services, through employees or other personnel engaged by a foreign enterprise for such purpose over a given period. On the other hand, a construction PE is generally understood to be constituted by a building site, construction, assembly or installation project or supervisory activities in connection therewith, also over a given period.

Myanmar's ratified treaties provide for the periods of a PE shown in Table 2.

Dividends

At the outset, Myanmar does not impose any withholding tax on dividends. Thus, no benefit is obtained under tax treaties.

Interest payments

The local withholding tax of 15% on interest paid to a foreign entity may be reduced under tax treaties as shown in Table 3.

Royalties and technical fees

Myanmar's tax treaties vary with respect to how withholding taxes are applied to technical fees and royalties as shown in Table 4.

The Malaysia and Vietnam tax treaties provide for a separate provision for taxation of technical fees which arise from "any services of a technical, managerial or consultancy nature".

Myanmar's domestic tax law definition of the term "royalties" is vague and non-exhaustive.

Capital gains

An important aspect of international tax planning is the capital gains provision under tax treaties. This is of particular importance in Myanmar because under Myanmar law, a capital gains tax of 40% is imposed on non-resident foreigners. Additionally, non-resident companies investing in the oil and gas industry are subject to capital gains tax ranging from 40% to 50%. For residents, gains from the sale, exchange or transfer by any means of capital assets, in Kyats (Ks) or foreign currency, are taxed at the rate of 10%, if the proceeds of all assets disposed exceed Ks5 million ($6,000).

Table 3

Country	Interest
India	10%
Lao PDR	10%
Malaysia	10%
Singapore	8% if recipient is a bank or financial institution; 10% in all other cases.
South Korea	10%
Thailand	10%
UK	No provision
Vietnam	10%

In general, most of the tax treaties allow exemption from Myanmar capital gains on the transfer of shares provided the assets of the Myanmar entity do not consist principally of immovable property in Myanmar. There may also be other conditions such as the percentage of ownership transferred.

If the conditions for exemption are not met and the transfer is deemed taxable in Myanmar, the Singapore treaty provides a unique advantage with a cap of 10% on applicable capital gains tax in all cases.

Table 4

Country	Royalties	Technical fees
India	10%	Included in the definition of royalties
Lao PDR	10% in respect of consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including computer software, cinematograph films, of films or tapes or discs used for radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.	No provision
Malaysia	10%	10% under a separate provision
Singapore	10% in respect of consideration for the use of, or the right to use, any patent, design or model, plan, secret formula or process, or for the use of, the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience 15% in all other cases.	No provision
South Korea	10%	No provision
Thailand	5% of the gross amount of the royalties for the use of, or the right to use, any copyright of literary, artistic or scientific work; 10% of the gross amount of the royalties for the consideration for any service of a managerial or consultancy nature, or for information technical services concerning industrial, commercial, or scientific experience; 15% of the gross amount of the royalties in all other cases.	(Not dealt with separately but see Royalties in left column)
UK	Exempt in the absence of a PE	No definition
Vietnam	10%	10% under a separate provision

Jack Sheehan
DFDL

Email: jack.sheehan@dfdl.com
Website: www.dfdl.com

Jack is a partner in the regional tax practice group of DFDL. He specialises in providing international tax planning and consulting, corporate structuring and restructuring, M&A and cross-border tax advisory services. He has advised clients in sectors ranging from telecommunications, mining, oil & gas, manufacturing, aviation, banking and financial institutions to government and aid-funded projects.

He has worked in Europe and Asia in various positions for both European and Big 4 firm and has been in Southeast Asia for the past six years. Before joining DFDL, he headed the tax department of a Big 4 firm managing a team of tax specialists.

Jack is regularly invited as a speaker on international taxation issues at events in SE Asia and is a regular contributor to international tax publications. He is a member of the Association of Chartered Certified Accountants in the UK.

Bernard Cobarrubias
DFDL

Email: bernard.cobarrubias@dfdl.com
Website: www.dfdl.com

Bernard is a tax director at DFDL and has more than 10 years of tax and legal experience in the region. He handles domestic and regional tax engagements covering Vietnam, Cambodia, Myanmar, and Lao PDR. He specialises in international tax services with focus on cross-border transactions, corporate restructuring, M&A advisory and implementation in various sectors. He also handles local business tax advisory services, tax planning, as well as regulatory and tax compliance work.

Before joining DFDL, he gained tax and legal experience in a Big 4 firm in the Philippines and in Vietnam.

Bernard is a frequent speaker at tax seminars and forums across SE Asia. He holds a Bachelor of Laws and a Bachelor of Arts in Communication (Journalism) degrees from the University of the Philippines.

Taxation at holding company level

In addition to benefits available under tax treaties, an important part of international tax planning will be the taxation at the holding company level. In many ways Singapore is an ideal holding company location for structuring investments into Myanmar.

Singapore's attractive tax policy of exempting foreign dividends and capital gains from Singaporean tax and the benefits provided under the Myanmar tax treaty, including a 10% cap on capital gains tax for Singapore investors and a reduction in the withholding tax on interest payments to 8-10%, makes Singapore an efficient location for structuring investments into Myanmar.

In the case of Singapore, tax planning does not stop at the Myanmar domestic level, but also extends to the level of the holding structure as shown in Diagram 1.

Nevertheless, many are expected to closely follow the progress of the tax treaty negotiations between Hong Kong and Myanmar. Hong Kong is a territorial tax system similar to Singapore which is also used as a holding location for investments into other Asian countries.

Diagram 1