Doing M&A in Asia Pacific

Tax traps and structuring opportunities

mazars

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Foreword

Seeking opportunities outside their country of origin is a natural part of the growth journey for many businesses. By opening up new markets and connecting with new customers, businesses can increase their sales and profits, while spreading their risk by not having to rely on any one single market.

However, conducting business in different countries and regions presents its own set of challenges. Commercial contexts vary and regulatory environments can be difficult to understand and even harder to keep up with as they change.

That is why we have published this study: to shed light on tax risks and opportunities related to mergers and acquisitions in Asia Pacific (APAC). We provide insight based on our experts' experiences that covers due diligence tax structuring in the region and the tax risks frequently encountered that can threaten the success of deal-making and subsequent integration processes in these fast-growing markets.

The study stakes an extended approach to APAC by including the following countries: Australia, China, Hong Kong, India, Indonesia, Japan, South Korea, Malaysia, Philippines, Singapore, Thailand and Vietnam.

We reveal the main traps are related to transfer pricing and the use of tax losses, though such transactions also benefit from several tax incentives such as amortisations of assets and goodwill, and tax exemptions applicable to mergers or demergers. And we emphasise the importance of engaging with multiple levels of control using the information provided, enlarging the due diligence scope to address critical areas, and conducting work on the ground with local experts and advisors.

In doing so, we highlight what businesses can expect from conducting deals in the region, the regulatory challenges they are likely to come up against, and how they can avoid the tax traps while making the most of the structuring opportunities.

Methodology

This study is aimed at guiding investors in connection with both the traps they may encounter and the incentives they may be offered by hosting countries when engaging in acquisitions in APAC.

For this purpose, we built a study around the main tax traps and tax incentives encountered in due diligence and tax optimisation processes when dealing with overseas acquisitions. Our local experts in tax due diligence, who have been involved in many transactions in the area, contributed to this study. As a result, they shed light on how to deal with the traps, their root causes and their consequences, how to overcome the difficulties encountered and how to benefit from the incentives.

The study has been conducted in close collaboration with Mazars' experts operating in the 12 targeted APAC countries: Australia, China, Hong Kong, India, Indonesia, Japan, Malaysia, Philippines, South Korea, Singapore, Thailand and Vietnam.

Applied colour codes should be interpreted in terms of likelihood of occurrence. For instance, a red colour code implies a high likelihood of encountering the issue, hence a clear red flag. Alternatively, a white colour code does not automatically imply that the issue cannot be encountered in a given jurisdiction – although we do not view the issue to be prevalent in that part of the world.

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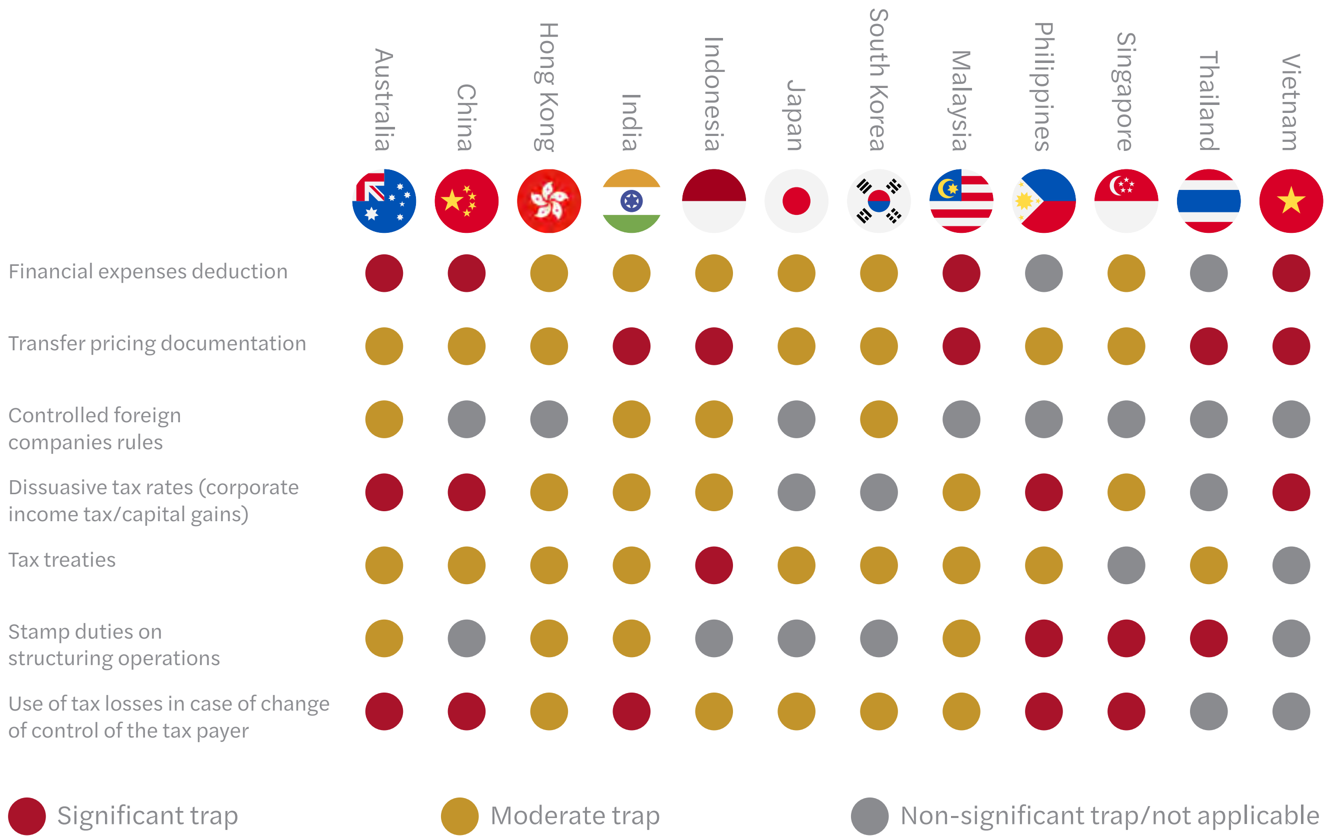
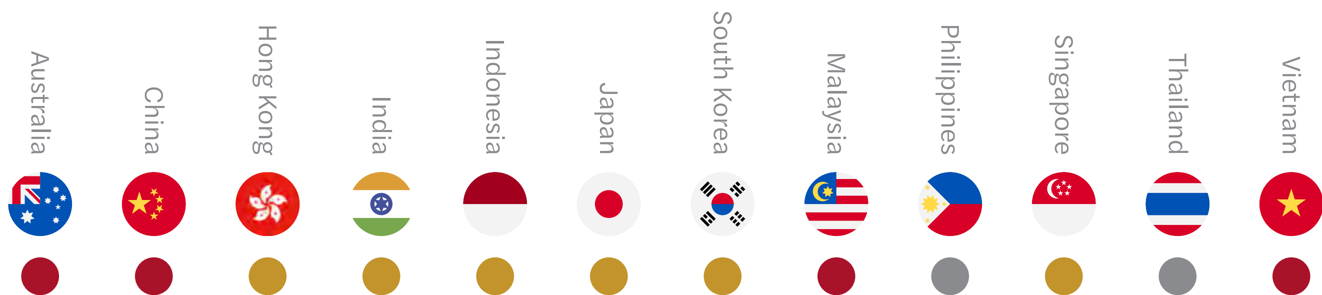
Top tax traps



Top tax traps

Financial expenses deduction



Nature

The equity available to a corporate taxpayer corresponds to the only 'free' resource enabling the coverage of any company's liability towards its creditors, who bear the solvency risk of the company. Therefore, local tax provisions most often regulate the proportion of financing of the corporate taxpayer through equity and debt. Such provisions aim at solving solvency issues borne by the company's creditors as well as at limiting the possibility of abuses through excessive interest deductions. In addition, financial expenses deduction see new limitations applicable on top of thin-capitalisation rules.

Impact

Financial expenses deduction rules determine the proportion of financial expenses actually incurred by the corporate taxpayer that can be considered as deductible for corporate income tax (CIT) purposes. The amount of interest paid in excess of the limits is not tax deductible.

Solutions

Companies must monitor the level of their debt and financial expenses in order to achieve a full deduction of their financial expenses.

Illustrations

Australia

Australia has prescriptive tax debt and equity definitions designed to follow accounting rules. Only debt capital expenditure is deductible. Various thin capitalisation rules exist, including a 1.5:1 debt to equity 'safe harbour'. These rules only apply if debt deductions exceed AUD 2 million.

Japan

As a general principle, foreign related party debts must not exceed three times of the amount of the lender's share in the borrowing Japanese company's net equity. Also, there is a limitation of interest deduction under earnings stripping rule. Thus, interest on related party borrowing exceeding 20% of the adjusted taxable profit is not allowed as a deduction.

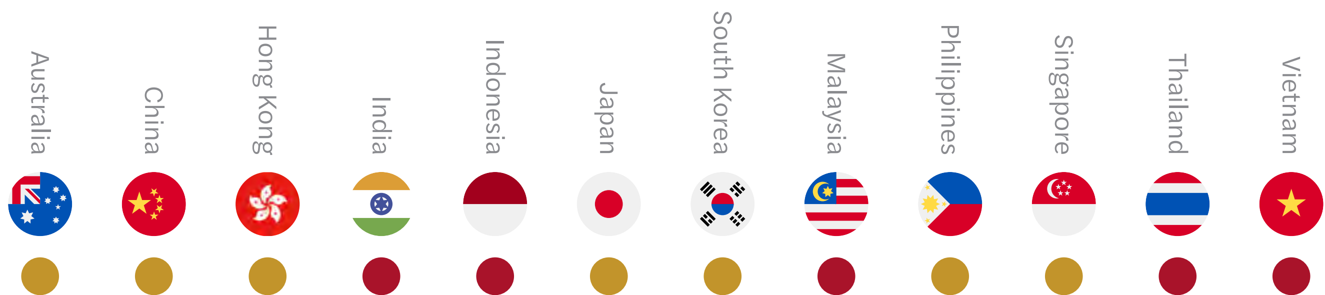
South Korea

Thin capital ratio is two times (in general) and six times for financial companies. In addition to the thin capital rule, if the interest amount paid to the overseas related party exceed 30% of taxable income, the exceeding amount is non-deductible. The interest paid for hybrid financial products are not deductible if the interest is not included in the taxable income of the receiving party in the other country.

Malaysia

Malaysia has introduced legislation and earning stripping rules that limit the deduction of interest on financial assistance between related persons. The maximum amount of interest deduction is restricted to 20% of tax-EBITDA (i.e. earnings before interest, taxes, depreciation and amortisation adjusted in the manner prescribed). Any unutilised interest expenses can be carried forward for future utilisation subject to fulfilment of conditions (i.e. no substantial change in shareholding). If the amount of interest expense does not exceed RM 500,000 (around EUR 100k), the rules would not apply.

Top tax traps
Transfer pricing documentation



Nature

Intercompany prices are sometimes used to relocate the companies' tax basis in a favourable tax jurisdiction in order to optimise the amount of corporate income tax. Therefore, in most countries, the local tax authorities have adopted the 'arm's length principle' implemented at OECD level, which stipulates that transactions between related parties should be carried out under the same conditions, notably in terms of pricing, as those that would have been agreed to between third parties. The companies must be capable of proving that the intra-group transaction they are involved in meets the arm's length criteria and must be able to justify, based on a sound documentation, that the price or the corresponding allocation of income, assets and/or equity (when recorded in respect of a branch) at stake duly reflects the situation of a non-related party under similar circumstances (transfer pricing documentation). In such contexts, the term 'transfer pricing' refers to the setting, analysis, documentation, and adjustment of prices between related parties (for goods, services or use of property, including intangible property).

Impact

Transfer pricing rules may vary from one country to another and may impose, in certain cases, having an updated transfer pricing documentation available at the level of the corporate taxpayer to support all inter-company transactions. In practice, the fraction of inter-company expense exceeding the level of similar expenses incurred at arm's length is added-back to the corporate taxpayer's income for corporate income tax purposes. Similarly, indirect subsidies resulting from prices set below arm's length terms may be disallowed for corporate income tax purposes at the level of the corporate taxpayer. Lastly, in certain cases (e.g. lack of transfer pricing documentation), additional penalties may apply. Note, however, that tax treaties may provide for the possibility of benefiting from symmetrical corrections of local transfer pricing reassessments in the framework of a mutual agreement procedure (art. 25 of OECD model).

Solutions

Companies must meet the arm's length principle to avoid the tax risks of transfer pricing. Proper documentation should be available to justify the transfer pricing policy applied.

Illustrations

Malaysia

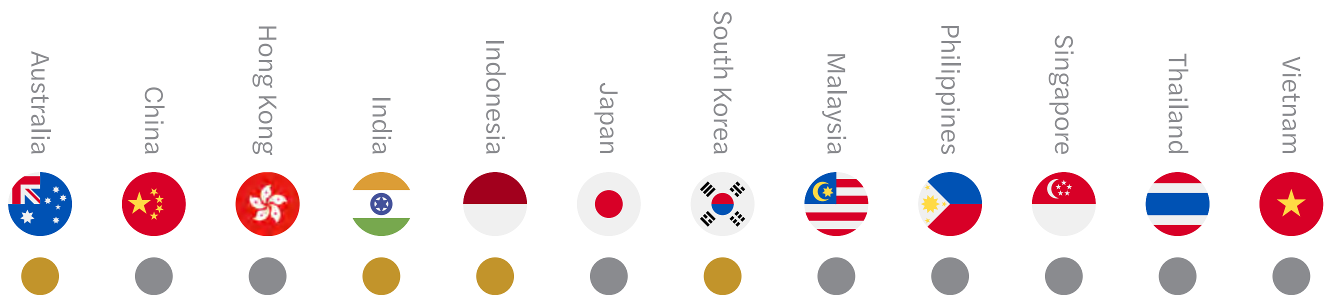
Companies are required to determine and apply the arm's length price in a transaction with an associated person, and to prepare contemporaneous transfer pricing documentation to support the transfer pricing policy adopted. Failure to prepare contemporaneous transfer pricing documentation would be subject to a penalty of not less than RM 20,000 and not more than RM 100,000. Non-arm's length transactions may be adjusted or disregarded. Any tax undercharged due to adjustments made by the tax authorities on transactions deemed not conducted at arm's length would be subject to penalty and surcharge.

Thailand

On 21 November 2018, Thailand introduced specific transfer pricing provisions into the income tax law. These provisions apply to accounting periods starting on or after 1 January 2019. The transfer pricing rules adopt the arm's-length principle. A transfer pricing disclosure form needs to be filed, together with the annual CIT return, if the annual turnover is THB 200 million or more; this is mandatory. In addition, transfer pricing documentation will be required in the event of a tax audit. However, currently, the format of transfer pricing documentation has not been specified.

Top tax traps

Controlled foreign companies' rules



Nature

Subsidiaries located in a jurisdiction where they benefit from a privileged tax regime (i.e. low taxation) are sometimes used to relocate their parent companies' tax basis in this favourable tax jurisdiction in order to optimise the amount of corporate income tax. Controlled Foreign Companies (CFC) rules aim at avoiding the use of low-taxed jurisdictions to shelter profits that would otherwise be taxed at a substantially higher rate.

Impact

CFC rules may vary from one country to another. A number of countries do not have such provisions/ rules. In most cases, the tax consequences of abusive use of those CFC consist in having the CFC income taxed at the level of the parent company.

Solutions

Companies should monitor the level of taxation locally and be able to prove the absence of abuse.

Illustrations

Australia

CFC rules apply to foreign companies with Australian shareholders controlling at least 40% of equity/ voting rights. If CFC fails a 5% 'active income test' then income of the CFC can become attributed back to the Australian shareholders.

China

CFC rules apply to non-Chinese subsidiaries of a Chinese resident company if held directly or indirectly (min. 50% of voting rights) and to the condition that the foreign subsidiary is subject to CIT at a rate lower than 12.5% in its country.

Hong Kong

There are no CFC rules in Hong Kong.

India

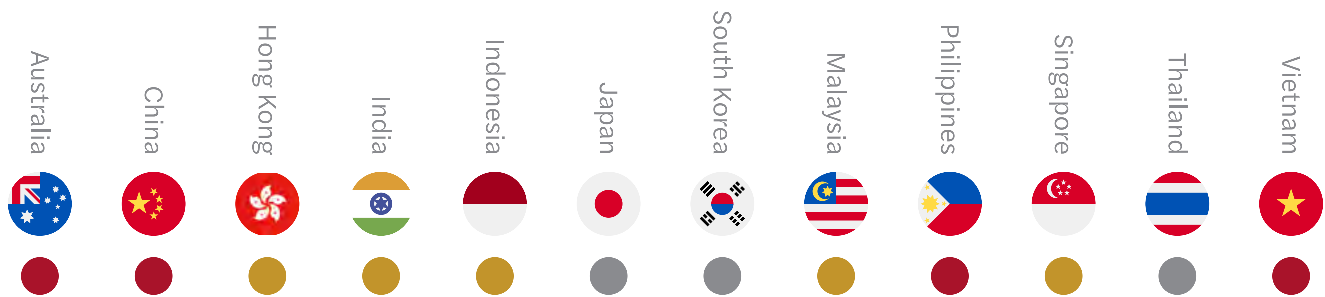
India does not have CFC rules, therefore there is no Indian tax on foreign profits that remain unremitted from offshore subsidiaries. Instead, India has introduced the concept of Place of Effective Management (POEM) in its local tax laws. POEM is defined to mean a place where the key management and commercial decisions of an entity are made. Thus, if a foreign company is managed from India, POEM provisions get triggered. If the POEM of a foreign company is in India, it is required to pay tax in India as if it is a tax resident of India. India has released POEM guidelines to guide the taxpayers as to which factors are relevant for determination of POEM.

Indonesia

CFC rules are applicable to taxpayers who possess at least 50% of shares' ownership, or together with other taxpayers collectively possess at least 50% of shares' ownership, on an overseas non-listed entity for passive income derived from dividends, interest income, rentals, royalties and capital gains.

Top tax traps

Dissuasive tax rate (corporate income tax/capital gains)



Nature

Capital gains tax rates may differ from local corporate tax income rates in order to limit the disposal of assets locally. This may be related to the nature of the assets at stake or to the way the assets are held (i.e. the vehicle through which the assets are owned).

Impact

Some applicable rates may discourage investors from selling their assets. Tax treaties should also be considered as they may provide reduced tax rates or exemptions.

Solutions

Appropriate structuring may help minimise the tax impact, for instance through the disposal of the enterprise at a higher tier of the legal structure, enabling the taxable gain to be in a country where it is subject to a lower tax rate.

Illustration

China

There is no capital gains tax in China, but capital gains are usually treated as a business related profit of the company. Therefore, for a Chinese resident company, the gain would be subject to corporate income tax at general tax rate of 25% together with the other profits of that company for the concerned tax year. For a non-PRC resident enterprise, it is subject to withholding tax of 10% on the gain. Proper planning may help minimise the tax and delay the payment of the income tax. It is either subject to a general tax rate of 25% for a resident company and 10% for a non-resident company.

Philippines

The applicable CIT rate is 25%, and 20% for qualified micro, small and medium enterprises. Capital gains on transfer of shares of stocks are taxed at 15% for shares not traded in an exchange. Sale of assets may be subject to the value added tax of 12%.

Singapore

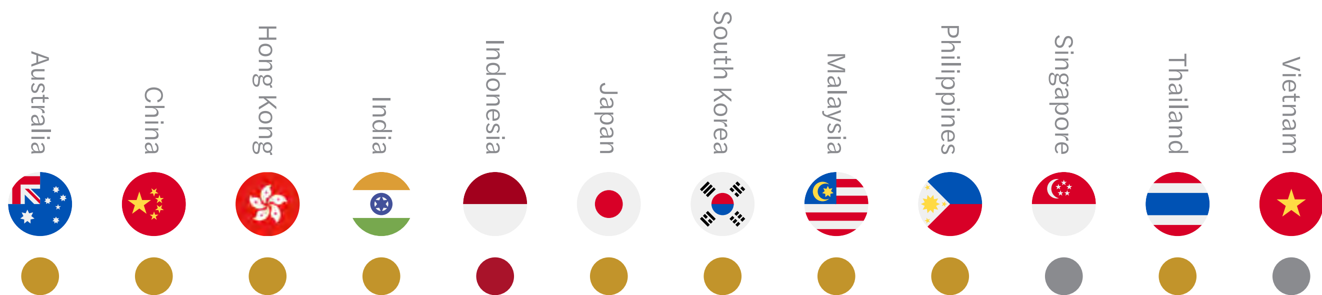
There is no capital gains tax in Singapore. However, where a gain is considered to be revenue in nature, such gain could be subject to tax in Singapore. There is a safe harbour rule that provides upfront non-taxation certainty on gains derived by a company from the disposal of ordinary share investments during 1 June 2012 to 31 May 2027, provided certain conditions are met. Proper documentation of motive for acquisition and disposal, funding mechanism, period of ownership, etc can assist to defend a challenge from the tax authority.

Vietnam

Capital gains tax rate in Vietnam is the same as standard CIT rate (currently 20% on gains). However, where the transferred capital is of a public company, such transaction is considered a transfer of securities and subject to 0.1% tax on the sales proceed. In fact, there is no clear guideline on tax implications of indirect transfer and valuation for taxation, which leads to unfair tax treatment upon inspection.

Top tax traps

Tax treaties



Nature

Since taxes aim to finance state budgets, they are generally set by governmental bodies and legislators that have jurisdiction over one country. Therefore, conflicting provisions from distinct countries may result in double taxation issues. To avoid such issues, states often enter into tax treaties that aim at avoiding double taxation. Tax treaties are drafted based on models issued either by the OECD and/or, more rarely, the UNO.

Impact

In practice, the provisions of the tax treaties considered allow two objectives to be achieved. Firstly, avoidance of double taxation: double taxation is avoided either through exclusive taxation of the income measured in the state who is a member of the tax treaty or through granting tax credits that aim at neutralising the impact, at the level of the beneficiary of the income, of the taxes possibly withheld at source at the level of the taxpayer who generated the income. Secondly, reduction of withholding tax rates: tax treaties often introduce specific reduced withholding tax rates applicable to certain types of income such as dividends, interests and royalties.

Solutions

Proper tax structuring could improve tax leakage on repatriation of profits, notably through the rerouting of profits which may enable withholding tax savings.

Illustrations

Hong Kong

There is no withholding tax on dividends and interest in Hong Kong. For royalties, the effective Hong Kong withholding tax rate is 4.95% unless royalties are accrued/paid to an associated person and there is a person carrying on a trade, profession or business in Hong Kong at any time wholly or partly owned the property in respect of which the sum is accrued/ paid. The withholding tax rate on royalties may be reduced to 3% under tax treaty between the Hong Kong and some countries like Finland or Switzerland, for example.

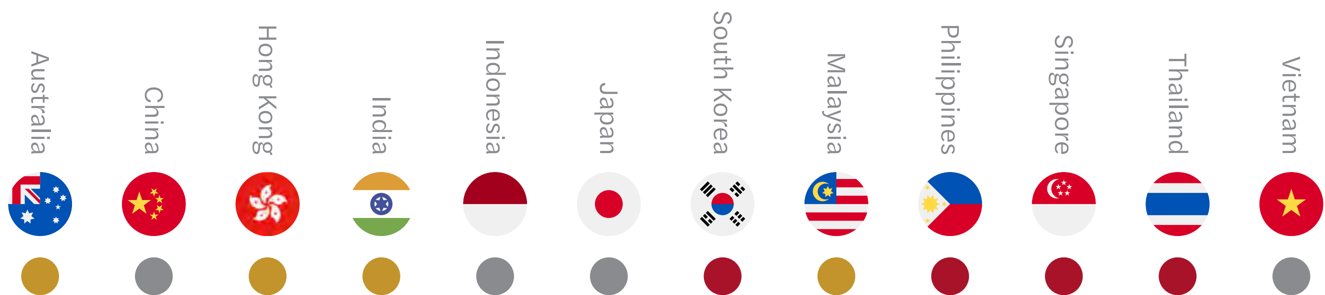
Indonesia

In general, tax treaties apply a reduced withholding tax rate for dividends, interest and royalties whilst business profit is tax exempted, to the condition that tax treaty relief requirements are met (i.e. Form DGT or Certificate of Residence), signed by the competent authorities and being uploaded in the DGT filing application. Failure to comply would result in an imposition of normal tax rate for cross border transaction (i.e. 20% of transaction value).

Vietnam

Vietnam has now concluded tax treaties with over 80 countries and some others are at various stages of negotiation. Local withholding tax rates on most taxable incomes are lower than those in treaties (e.g. dividends and interest).

Top tax traps
Stamp duties on structuring questions



Nature

Where enforced, this tax is applied on the transfer of homes, buildings, copyrights, land, patents and securities. When this tax exists, the transfer of documents in locations is legally enforceable only when they are stamped, which proves the amount of tax paid. As they correspond in most cases to fixed amounts or relatively low costs, stamp duties are often seen as ancillary taxes. However, structuring transactions (asset deals, share deals, capital decreases, mergers) usually involve stamp duties depending on the laws of the countries. In certain cases, those costs may be substantial and could impact the carrying out of a transaction.

Impact

Stamp duties are an actual cost in transactions which has a direct cash effect at the level of the paying party. In certain countries, a joint liability exists of both parties to a transaction for the payment of stamp duties related to the transaction.

Solutions

In practice, companies should adopt the best routes that involve the most minimal stamp duty costs, either through the relocation of the transaction or the modification of the assets transferred.

Illustrations

South Korea

Transfer of shares are taxed at 0.45-0.35%. Stamp duty is from KRW 20,000 to 350,000 per case depending on the transaction amounts.

In case of share deal, Deemed Acquisition Tax is assessed on the assets (such as real estate, vehicles, ships and airplanes which require registration) that is owned by the target company if the investor purchases shares over 50% of the target company and becomes a majority shareholder.

Philippines

Transfer of shares are taxed at the rate of PHP 1.50 for every PHP 200 value of shares transferred. Original issuance of shares is taxed at PHP 2.00 on each PHP 200. Transfer of real estate is taxed at PHP 15 per PHP 1,000. For mergers that will qualify as a tax-free exchange, no stamp duty will be due on the transfer of shares. However, original issuance of shares shall be subject to stamp duty.

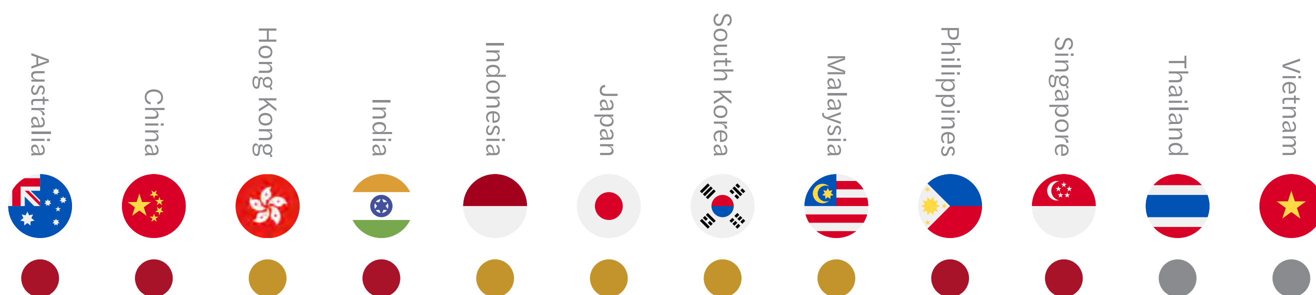
Thailand

Thai stamp duty is applicable on most documents filed by companies with government agencies or entities, and on official documents of the company. Stamp duty is levied on instruments, not on transactions or persons.

Only instruments listed in the stamp duty schedule of the revenue code are subject to stamp duty, and the persons liable to pay this stamp duty are those associated with the instrument, such as the persons executing the instrument, the holders of the instrument or the beneficiary. Stamp duty is imposed at varying rates on certain legal instruments.

Top tax traps

Use of tax losses in case of change of control of the taxpayer



Nature

For corporate income tax purposes, most states enable the offsetting of past tax losses carried forward against the taxable income of the year to enable the determination of the corporate taxpayer's corporate income tax basis. Therefore, existing tax losses may give rise to the recognition of deferred tax assets in the consolidated accounts, when it is likely that the losses will be used for offsetting tax purposes. In order to limit the abusive use of tax loss carry-forwards by corporate taxpayers who did not generate the corresponding losses and to whom the tax attributes have been transferred, the change of control may trigger the forfeiture of tax losses or may limit their use.

Impact

The total or partial forfeiture of tax losses carried forward in case of a change of control could have a potential impact on cash flows (as the corporate income tax cash-out increases) and on deferred taxes. Please note that several countries have no restrictive legislation on this matter.

Solutions

It is very difficult in practice to avoid the forfeiture of tax losses in case of a control change, when the local tax provisions impose such forfeiture. In this case, the risk could be reduced by acquisition price adjustments considering the amount of tax attributes lost.

Illustrations

India

As per Indian tax laws, if a taxpayer has incurred business losses, the said losses can be offset against the taxable business profits of the subsequent years. However, losses cannot be carried and offset if there is a change in shareholders holding shares exceeding 49% of voting rights. This provision restricting the set off of brought forward tax losses is not applicable to eligible start-ups and to Indian subsidiaries of foreign companies, where more than 49% shareholding of the Indian subsidiary has changed due to amalgamation or demerger of the foreign parent and more than 51% of the shareholders of the amalgamating or demerged company continue to be shareholders of the amalgamated or resultant company.

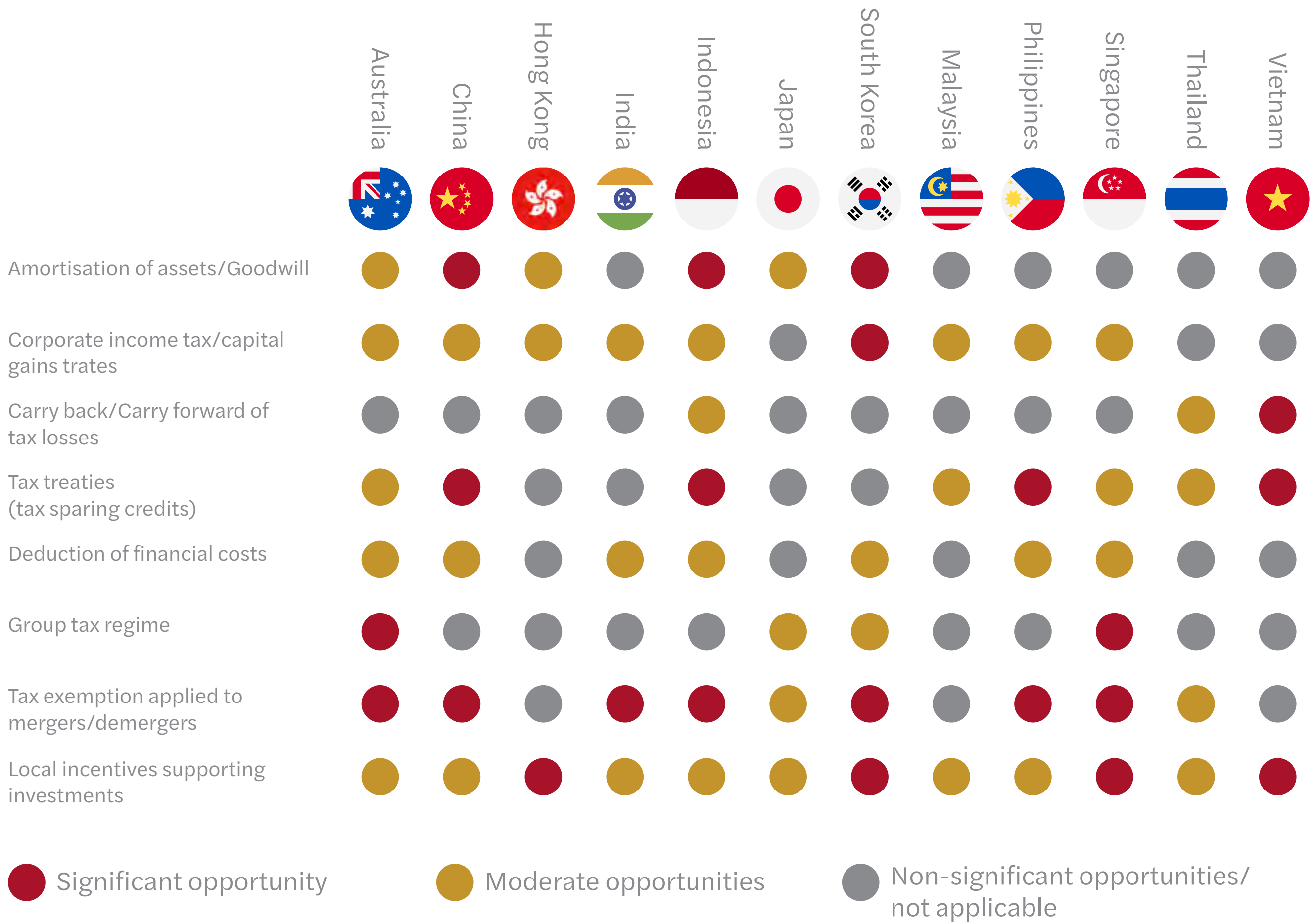
Japan

Tax losses carried forward are not impacted by a change of shareholder to the extent there is no change in the underlying business line that generated the tax loss (losses may be carried forward for ten years maximum; the carry-back of losses is not permitted). Tax loss carry forward may not be maintained if it involves merger or company spit.

Singapore

Unutilised tax losses and capital allowances will be lost in the case of an asset deal as they remain with the transferor. In a share deal, these can only be carried forward provided changes in the immediate/ultimate shareholders at relevant dates do not exceed 50%. In addition to carry forward the unutilised capital allowances, the same business test needs to be met. Where there is a substantial change in shareholding of the target company after an acquisition in a share deal, a waiver request can be made to the minister to allow the carry forward of the unutilised losses and capital allowances, which is considered case by case. To mitigate the risk of a reduction in value of the target, a revaluation of the target's deferred tax asset should be considered.

Top tax structuring opportunities



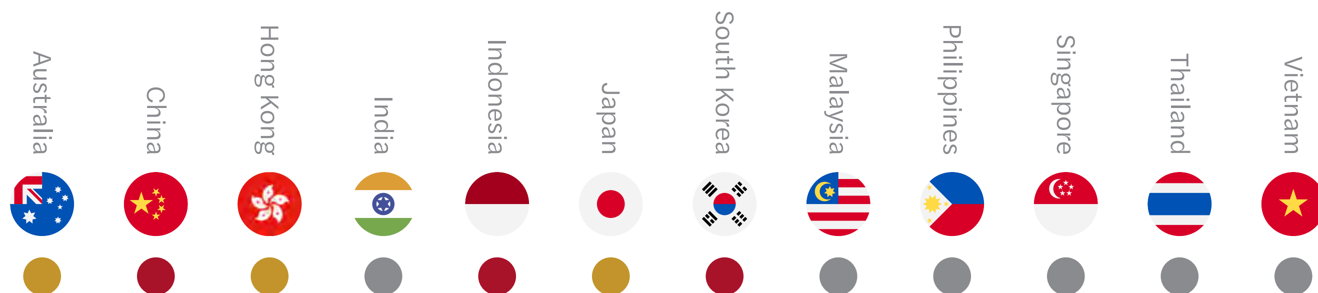
	Australia	China	Hong Kong	India	Indonesia	Japan	South Korea	Malaysia	Philippines	Singapore	Thailand	Vietnam
Amortisation of assets/Goodwill	Moderate	Significant	Moderate	Non-significant	Significant	Moderate	Significant	Non-significant	Non-significant	Non-significant	Non-significant	Non-significant
Corporate income tax/capital gains trates	Moderate	Moderate	Moderate	Moderate	Moderate	Non-significant	Significant	Moderate	Moderate	Moderate	Non-significant	Non-significant
Carry back/Carry forward of tax losses	Non-significant	Non-significant	Non-significant	Non-significant	Moderate	Non-significant	Non-significant	Non-significant	Non-significant	Non-significant	Moderate	Significant
Tax treaties (tax sparing credits)	Moderate	Significant	Non-significant	Non-significant	Significant	Non-significant	Non-significant	Moderate	Significant	Moderate	Moderate	Significant
Deduction of financial costs	Moderate	Moderate	Non-significant	Moderate	Moderate	Non-significant	Moderate	Non-significant	Moderate	Moderate	Non-significant	Non-significant
Group tax regime	Significant	Non-significant	Non-significant	Non-significant	Non-significant	Moderate	Moderate	Non-significant	Non-significant	Significant	Non-significant	Non-significant
Tax exemption applied to mergers/demergers	Significant	Significant	Non-significant	Significant	Significant	Moderate	Significant	Non-significant	Significant	Significant	Moderate	Non-significant
Local incentives supporting investments	Moderate	Moderate	Significant	Moderate	Moderate	Moderate	Significant	Moderate	Moderate	Significant	Moderate	Significant

Significant opportunity

Moderate opportunities

Non-significant opportunities/ not applicable

Top tax structuring opportunities
Amortisation of assets/goodwill



Nature

As a general principle, goodwill is an intangible asset which provides a competitive advantage, such as a strong brand, reputation, or high employee morale. In an acquisition or restructuring, goodwill appears on the balance sheet of the acquirer in the amount by which the purchase price (or transfer value) exceeds the net tangible assets of the acquired business/company. In such a context, this amount is considered as representing the synergies between the existing business and the acquired/transferred business, either in the form of cost reductions and/or revenue enhancement. The recognition of such goodwill is sometimes supplemented by the possibility to amortise such goodwill from an accounting standpoint and, in some countries, from a tax standpoint, in order to reflect that a part of the price paid at the moment of acquisition, corresponds to future profits of the business transferred or acquired. Note that the amortisation of goodwill and intangible assets for tax purposes is not systematically allowed.

Benefits

Where possible, the goodwill (market share, opportunities, etc.) and intangible assets (patents, software, etc.) may gradually be amortised using a straight-line method. Amortising those assets may lead to significant tax cost reductions.

Optimisation process

Accordingly, companies should carry out further studies about the feasibility and the domestic tax treatment with respect to amortization.

Illustrations

Australia

No tax deduction for amortisation of goodwill is permitted. Accelerated depreciation applies to plant and equipment. Only specific intangible assets, being patents, registered designs and copyright are subject to depreciation.

China

Amortisation of goodwill is not tax deductible. Therefore, a feasibility study is recommended to avoid the recognition of such goodwill.

Japan

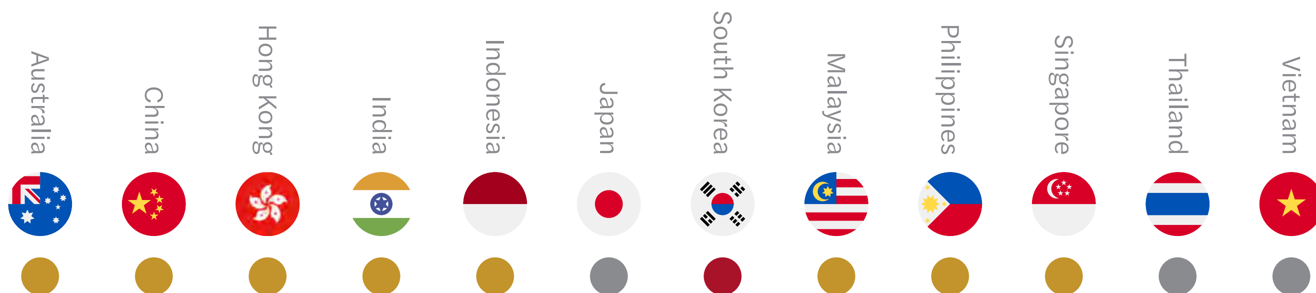
Goodwill may be recognised for tax purpose under the acquisition in the form of business transfer (asset sale), merger, company split or contribution in-kind between the seller and the unrelated buyer. The goodwill will not be recognised in share deal. The goodwill must be depreciated over 60 months.

South Korea

Tax law recognises goodwill only if the goodwill is acquired externally with the proper valuation evidence for the consideration of the right of business or approval, legal status, geographical merit, business know-how and intel, customers, etc. Amortisation costs of acquired goodwill is deductible for tax purpose.

Top tax structuring opportunities

Corporate income tax/capital gains rates



Nature

The profits derived from a corporate taxpayer's day-to-day activities, as well as the gains resulting from the disposal of its assets, are generally subject either to CIT under standard rules or to capital gains tax, the rate of which often varies depending on the nature of the assets disposed. In several cases, reduced tax rates may be set up by local tax authorities and used as incentives to corporate taxpayers. Please also note that most tax treaties aiming to avoid double taxation also set forth reduced tax rates (mainly for withholding tax purposes) which may enable tax savings upon proof of the tax residency of the taxpayers on each end of the financial flow.

Benefits

Some applicable rates may encourage investments.

Optimisation process

An appropriate structuring could improve the utilisation of these incentives, notably through proper routing of the financial flows of income.

Illustrations

Hong Kong

There is no capital gains tax in Hong Kong. In addition, capital gains are exempt from income tax provided that the taxpayer has enough information and documentary evidence to substantiate that the gains are capital in nature. Otherwise, the gains may be taxed as standard profits tax rate. Accordingly, appropriate structuring may help minimise the tax impact.

South Korea

For capital gains of corporations, the normal corporate income tax rate of 11% - 27.5% is applied instead of the higher capital gain tax rate applicable to individuals (i.e. 11% - 49.5%).

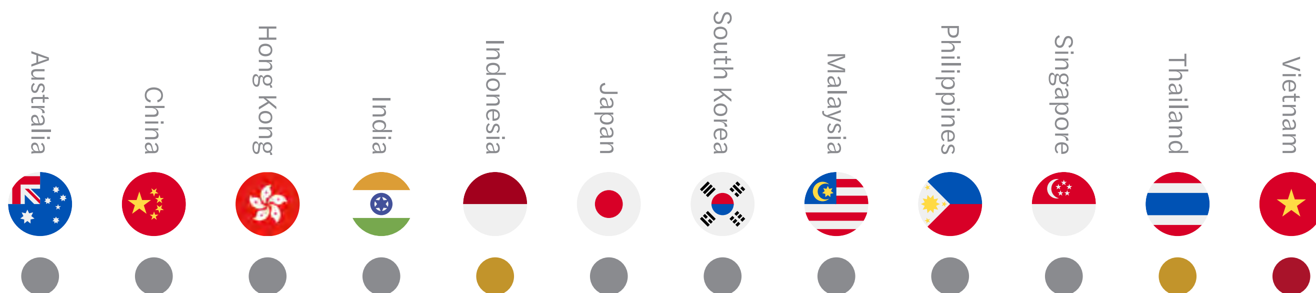
Malaysia

There is no capital gains tax in Malaysia except for property gains tax in respect of chargeable gain from the disposal of property or shares in a real estate company. Real estate gains tax rates range from 10% to 30%: 30% for disposal within three years after the date of acquisition, 20% for disposal in the fourth year, 15% for disposal in the fifth year, 10% for disposal in the sixth year.

Thailand

There is no capital gains tax in Thailand. Capital gains are treated as ordinary income for the purpose of calculating corporate income tax. The standard corporate income tax rate in Thailand is 20% of net profits. A lower progressive corporate income tax rate applies to small and medium-sized enterprises with a net profit less than THB 3 million.

Top tax structuring opportunities
Carry back/carry forward of tax losses



Nature

For corporate income tax purposes, most states enable the carry-forward or the carry-back of past tax losses in order to offset them against the taxable income of either past years (carry-back) or subsequent years (carry-forward). Thus, the carry-forward and carry-back impacts the determination of the corporate taxpayer's corporate income tax basis. Therefore, existing tax losses may give rise to the recognition of deferred tax assets in the consolidated accounts if it can be evidenced that it is likely that, at year-end, the taxpayer will generate enough tax basis in the future to offset those tax assets. Carry forward is mainly adopted by emerging countries but not all countries allow carrying tax losses back.

Benefits

Both carry-back and carry-forward mechanisms allow some flexibility in the management of losses by corporate taxpayers. Also, having losses carried forward or carried back will impact the deferred tax in consolidated accounts.

Optimisation process

Companies should monitor the expiry of the tax losses in accordance with the provisions of their domestic tax law.

Illustrations

Australia

Unlimited carry forward of losses (subject to change of ownership or similar business tests) is possible. Limited 'Covid measure' carry back applies for 2021 and 2022.

India

Carry back of tax losses against business income is not permitted in India. Tax losses can be carried forward and set-off against future tax profits. Tax losses are classified into two categories (i) unabsorbed depreciation (ii) business loss (excluding unabsorbed depreciation). Unabsorbed depreciation can be carried forward and set off against any income (including capital gains) indefinitely. Business loss can be set off against business income up to eight subsequent years. Capital losses arising on transfer of assets can be set off against subsequent capital gains up to eight subsequent years. Further, losses are entity specific and not business specific, therefore, losses of one business, say trading, can be set off against profits of another business, say services, which is carried on by the same entity even if the business in which the loss arose (trading) is discontinued. Tax losses of an amalgamating company can be carried forward by the amalgamated company only if it is engaged in manufacturing, shipping, the hotel industry or banking. Tax losses of a demerged undertaking can be carried forward and set off in the hands of the resulting company.

Thailand

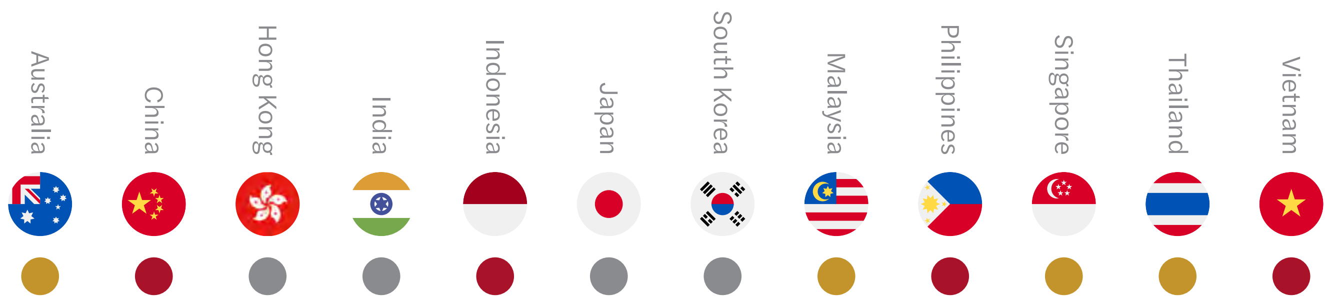
Net losses may be carried forward for five accounting periods to be set off against future profits from all sources. There is no provision for carrying back losses. Each company's losses are treated separately. There is no form of group relief or relief by consolidation in Thailand.

Vietnam

Losses may be carried forward for five years maximum. The carry-back of losses is not permitted.

Top tax structuring opportunities

Tax treaties (tax sparing credits)



Nature

In some cases, the amount of tax credit necessary to avoid double taxation may be higher than the amount of the income tax that should be paid in the country where the income is originated. This results in a potential tax optimisation when the tax credit can be offset by the tax due at the level of the beneficiary of the income.

Benefits

Such mechanism increases the tax credit to be offset by the tax charge of the beneficiary of the income sourced abroad.

Optimisation process

Considering that the gain could be significant for a company that operates an entity in an emerging country benefiting from tax-sparing credits, companies should find a way to manage the tax credit offsetting at the level of the beneficiary.

Illustrations

China

Usually, the foreign tax credit is limited to 25% of the taxable income from foreign sources. Excess amount can be carried forward for five years.

Indonesia

In general, tax treaties apply a reduced withholding tax rate for dividends, interest and royalties whilst business profit is tax exempted, subject to tax treaty relief requirements.

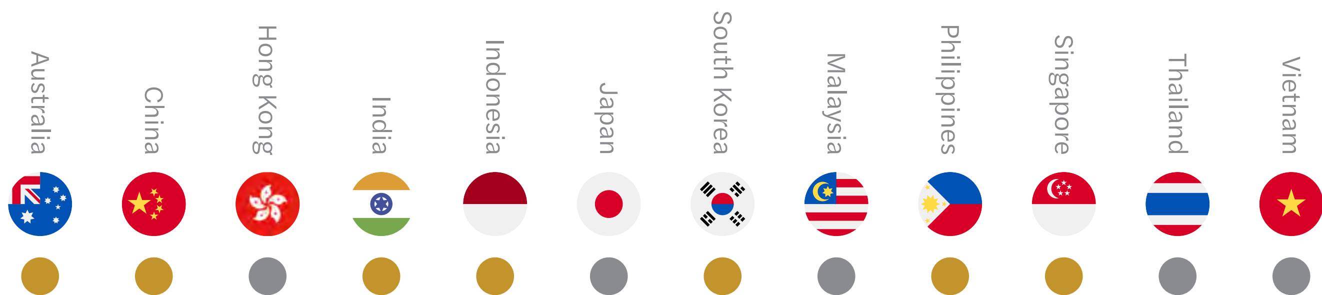
Philippines

For a Non-Resident Foreign Corporation (NRFC), a final withholding tax of 15% is imposed on cash or property dividends received from a Philippine corporation subject to the condition that the country of the NRFC shall allow a tax credit against the tax due from the NRFC taxes deemed to have been paid in the Philippines equivalent to 10% effective January 1, 2021 or, does not impose any income tax on dividends received from a domestic corporation.

Vietnam

In some tax treaties, Vietnam allows the tax sparing credit system. Accordingly, the tax exemptions according to Vietnam law are entitled to the tax sparing credit where the resident of the other country shall be entitled to credit the Vietnamese tax that would have been paid according to the laws of Vietnam (and the treaty) if the Vietnamese tax had not been reduced or relieved in accordance with the special incentive measures designed to promote economic development in Vietnam. This tax sparing credit system normally terminates a certain number of years after the tax treaty is effective. Business expansion is also eligible to CIT incentives.

Top tax structuring opportunities
Deduction of financial costs



Nature

As a general rule, it is important to determine whether domestic tax law provisions put limitations to the tax deduction of financial expenses. Indeed, such restrictions may result either from thin capitalisation rules which aim to preserve the solvency of the corporate taxpayer at stake, or from specific provisions aiming to discourage a number of tax optimising structures considered abusive by the local tax authorities.

Benefits

The deduction of financial costs enables tax leveraging of investments abroad and more flexibility in the repatriation of profits.

Optimisation process

Companies should seek an improvement of the gearing between equity financing and debt financing and optimise the use of specific capital structures.

Illustrations

China

Deduction of financial costs may be allowed when financing the acquisition of companies and if it is relevant to the business of the company and the future gain on disposal is subject to enterprise income tax.

Indonesia

Unless thin capitalisation restrictions apply or interest paid is not at arms length, interest deduction is allowed.

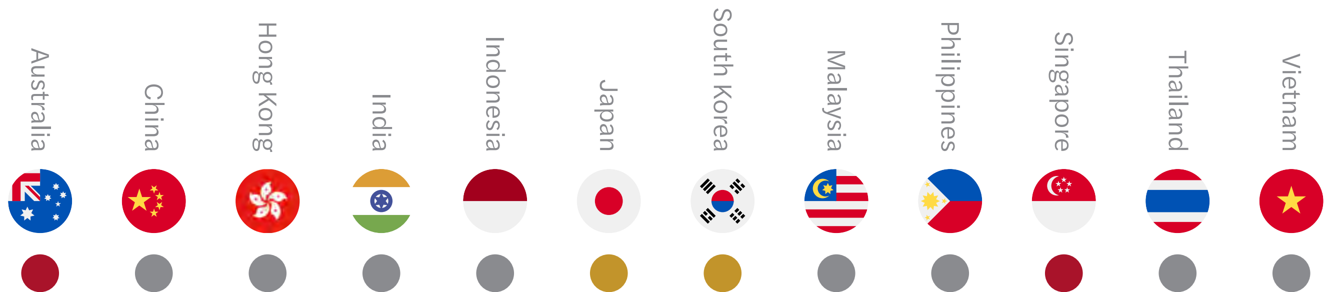
Malaysia

Interest expenses on money borrowed to finance the acquisition of shares is not tax deductible. Interest expenses on money borrowed to finance the acquisition of assets employed in the production of gross income from a business is deductible but may be subject to the restriction under the earning stripping.

Singapore

Interest incurred on loans to acquire shares is usually not deductible as dividend income from the subsidiaries is generally non-taxable. However, interest incurred on loans to acquire assets should be deductible unless it is attributable to non-income producing assets.

Top tax structuring opportunities
Group tax regime



Nature

Specific incentives may apply to groups of companies (participation exemption, assessment of corporate income tax charges based on the aggregated income of the group members, etc.).

Benefits

The group tax regime enables a reduction of the tax basis through the offsetting of the losses incurred by tax group members by the profits earned by other tax group members.

Optimisation process

Proper structuring is sometimes needed to be eligible to participation exemption or tax group regimes.

Illustrations

Australia

Australia operates a 'tax consolidation' regime providing groups of 100% controlled companies to be treated as a single taxpayer.

Hong Kong

There is no group tax regime or group tax loss relief in Hong Kong.

Japan

The transaction among 100% owned group companies do not recognise gain or loss, including donation, when the transaction meets a certain threshold.

South Korea

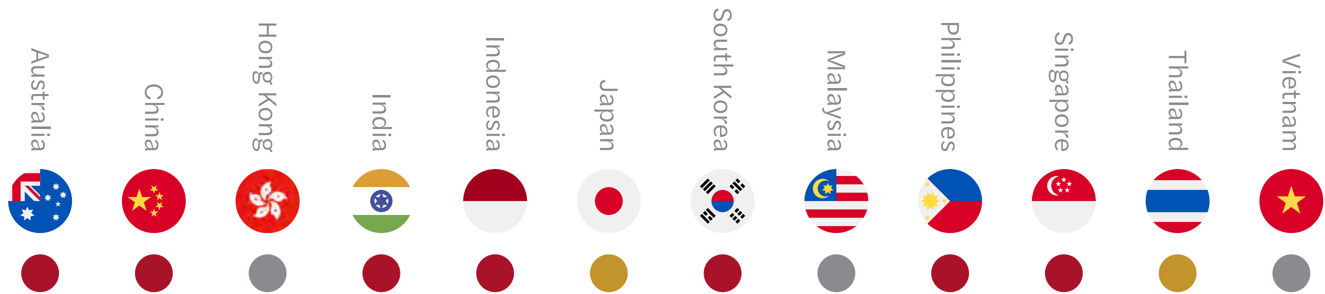
Consolidated tax payment is allowed among the completed owned companies (must own 95% or more).

Singapore

A company is allowed to transfer excess current year trade losses, tax depreciation, and approved donations to another company within the same group if certain conditions are satisfied (i.e. all companies must be incorporated in Singapore, at least a 75% ownership relationship between claimant and transferor, and have the same accounting year-end).

Top tax structuring opportunities

Tax exemption applied to mergers/demergers



Nature

In a number of countries, the tax impact of mergers, de-mergers and transfers of branches of activities may be neutralised (tax roll over) to the extent that a number of requirements are met.

Benefits

Companies are tax-exempt on the gain that may result from a merger, de-merger or assimilated transaction at the level of the absorbing company.

Optimisation process

Eligibility to such regimes should be carefully verified.

Illustrations

India

The Income-tax Act exempts a transaction of amalgamation of a company from capital gains tax where the amalgamated company is an Indian company and of the amalgamation in accordance with the conditions specified under the Income-tax Act, 1961. For a demerger to be a tax neutral the entities involve in demerger should be companies and the transfer (of undertaking), pursuant to demerger, should be pursuant to sections 230 to 232 of the Companies Act, 2013 and should meet the conditions specified in the Income-tax Act, 1961.

Indonesia

Currently tax exemption applies for transfer of business with book value on the approval of the DGT (Directorate General of Taxes) if the following criteria are met: (1) the surviving entity has nil or less amount of fiscal loss compared to dissolving entity, (2) the entity which renders the assets and liabilities is dissolved, (3) to satisfy the business purpose test, (4) no outstanding tax liabilities indicated by tax clearance, (5) in the event the business transfer takes place in the middle of a fiscal year, the income tax (article 25) of the surviving entity is not less than the income tax (article 25) of each entity before the business transfer takes place.

Malaysia

Subject to conditions, relief from stamp duty and real property gains tax may be available : (i) for the transfer of shares or undertaking in connection with a scheme for the reconstruction or the amalgamation of companies, (ii) for the transfer of property (including shares) between associated companies with the objective of achieving greater efficiency in operation.

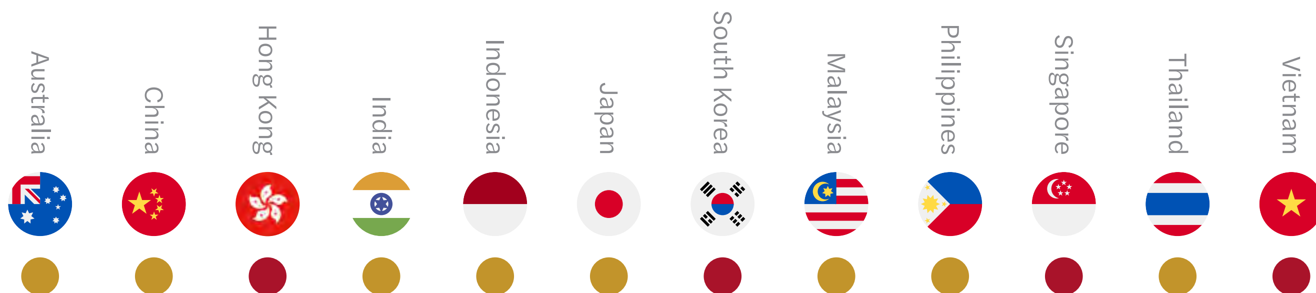
Philippines

No gain or loss is recognised if property (including shares of stock) is transferred to a corporation by a person in exchange for stock or units of participation in the corporation in such a way that the person, alone or with no more than four others, gains control (stock ownership of at least 51% of the total voting power) of the corporation.

Singapore

For qualifying amalgamations, all risks and benefits that exist prior to the merger are transferred and vested in the amalgamated company. Hence, the tax treatment of provisions, trading stocks, capital allowances, etc., transferred to the amalgamated company is ascertained on the basis that the businesses of the amalgamating companies continue in the amalgamated company, as part of the business (or enlarged business) of the amalgamated company. Unabsorbed tax loss items can also be transferred from the amalgamating company. For mergers that do not qualify, normal tax implications apply, i.e. stamp duty, goods and services tax (GST) and balancing allowances/charges, etc. apply to assets being transferred unless exemptions apply.

Top tax structuring opportunities
Local incentives supporting investments



Nature

Local tax law may encourage the development of a sector of activity or of an undeveloped geographic area by granting various tax incentives (e.g. corporate income tax exemption or a lower tax rate).

Benefits

A company entitled to benefit from such incentives will reduce its tax burden. As a result, it will be able to expand its activity.

Optimisation process

Identification and eligibility to a specific tax incentive may sometimes be a driver for the location of the foreign establishment.

Illustrations

Hong Kong

Hong Kong introduced tax incentives to certain industries such as profits tax exemption for the fund industry and concessionary tax rate for insurance and insurance broker businesses, corporate treasury centres and aircraft and shipping leasing.

India

India has introduced certain tax incentives recently. Notably (i) new domestic manufacturing companies (incorporated after 01.10.2019) are taxable at a lower corporate income tax rate of 15%, subject to certain conditions, (ii) new eligible startups enjoy 100% tax rebate on profit for a period of three years under conditions, (iii) corporate income tax rates have reduced to around 25%, (iii) offshore banking units of foreign banks set up in a special economic zone are eligible for 100% tax rebates in the first five years and 50% tax rebate in the next five years and (iv) units which are based in International Financial Service Centre are eligible for 100% tax rebate for 10 years out of 15 consecutive financial years.

Philippines

Philippines has tax incentives such as an income tax holiday or lower rate of income tax based on gross income (5% on gross income) for entities or corporations engaged in activities under the Investment Priority Plan, those located in special economic zones, or renewable energy.

Thailand

The following tax incentives, among others, are possible under the Office of the Board of Investment regime: exemption from/reduction of import duties on machinery, for raw or essential materials, on raw or essential materials imported for use in production for export, exemption from corporate income tax on the net profit and dividends derived from the promoted activity, a 50% reduction of the corporate income tax, double deductions for the cost of transportation, electricity, and water supply, an additional 25% deduction for installation or construction costs of facilities.

Vietnam

In Vietnam, CIT incentives are available, including a preferential tax rate (10%, 15% or 17%) and tax holidays (tax exemption up to four years and 50% tax reduction up to nine years) which are granted to new investment projects based on their business activities (e.g. healthcare, education, high-tech, infrastructure development, and software production, etc.) or their location (within qualifying economic zones, hi-tech zones, industrial zones, difficult/special socio-economic areas). Business expansion is also eligible for CIT incentives.

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