



马来西亚中国服务部税务月刊

马来西亚和中国双边税收协定 (DTA)

介绍

马来西亚征收所得税的依据为1967年所得税法 (“所得税法”)。马来西亚所得税的征收基础主要为来源地原则,即产生或来源于马来西亚的所得应缴纳马来西亚所得税。适用该原则的主要依据是,由于相关所得源自于马来西亚境内,因此马来西亚有权对其征收所得税。

需要注意的是,其他国家同样可能保留其征税权利,并且其征收基础不一定全部为来源地原则,还包括例如纳税人居所,国籍,公民身份和住所等判断因素。因此上述国家的纳税人可能需就其全球所得纳税,同一纳税人取得的同一笔所得将面临双重征税风险。例如中国居民从马来西亚获取的所得由于源自马来西亚而在马来西亚被征税,而在中国则由于其为中国税收居民而被征税。毫无疑问,双重征税将成为双边经贸发展的阻碍。因此,马来西亚和中国签署了双边税收协定 (DTA),该双边税收协定共涵盖 29 个条款,其中包括适用范围、收入类型及税种范围,居民身份,常设机构和消除双重征税方法等内容。

所得税法与双边税收协定的关系

所得税法是马来西亚所得税的征收依据。当中国居民“产生”源自马来西亚的所得时,需要根据所得税法相关条款评估该所得是否应在马来西亚纳税。应考虑事项包括:

- 该所得是否属于马来西亚所得税应税所得范围以内;以及
- 该所得是否来源于马来西亚

一旦确定该所得应根据所得税法纳税,中国居民应根据双边税收协定条款评估该所得是否为源自马来西亚。如能确定,则就该所得应缴纳马来

西亚所得税，同时中国居民应评估其是否符合优惠税率、豁免或税收抵免等协定待遇。

股息，利息和特许权使用费（双边税收协定中第 10，11 和 12 条款）

中国居民在马来西亚所获得的利息和特许权使用费收入需征收马来西亚所得税，征收方式为马来西亚付款人从将向中国居民支付的款项中先行扣除预扣税款并缴纳给马来西亚内陆税收局。法定的预扣税率范围为总收入的 10% 至 15%。不同收入的预扣税率的汇总如下:-

收入种类	税法下的预扣税率	双边税收协定的税率
股息	0%	10% (注 1)
利息	15%	10% 或 0% (注 2)
特许权使用费	10%	10%

如果中国居民未在马来西亚形成常设机构，预扣税将被视为最终税，中国居民无需进行所得税申报。我们将会在下期税务月刊中继续深入讨论常设机构概念和它对利息以及特许权使用费所得的影响。

注 1: 在一些情况下，双边税收协定可能包括了比马来西亚税法规定更高的税率。由于双边税收协定的宗旨是避免或减少双重征税，如果本身不属于马来西亚所得税法征收范围或根据所得税法应豁免，马来西亚可不依照双边税收协定征税。因此，由于国内的税法（即马来西亚所得税法）不对股息征税，即使双边税收协定规定的股息预扣税率为 10%，也无需纳税。

注 2: 马来西亚与中国在 2016 年 11 月 1 日签署了马中双边税收协定的换函。此换函将会于 2016 年 11 月 1 日生效，并在双边税收协定第 5 (a) (iv) 和 5 (b) (iii) 分段，条款 11（利息）中列明各自的政府机构。在双边税收协定第 4 段，条款 11（利息）中列明利息收入将会获得税务豁免。

上述的机构如下:

在中国

- 中国国家开发银行股份有限公司
- 中国农业发展银行
- 中国进出口银行
- 国家社会保障基金理事会
- 中国出口信用保险公司
- 中国投资有限责任公司
- 丝路基金有限责任公司

在马来西亚

- 马来西亚进出口银行
- 国家信托基金
- 退休基金
- 马来西亚农业银行
- 马来西亚中小企业银行
- 马来西亚开发银行
- 马来西亚国库控股有限公司

鉴于此，某些特定的跨境融资安排的税务效率将得以提升。例如，中资企业旗下的马来西亚子公司从上述中方机构获取融资，对其应付给提供

贷款的中方机构的利息将无需缴纳**10%**的预扣税。此项积极的举措将有助于促进两国之间贸易投资便利化，以实现互惠共赢的宗旨。

不动产所得 (双边税收协定第 6 条)

在马来西亚，**1948** 年和 **1967** 年的所得税法第三分段将“不动产”定义为土地（以及土地之上的永久附着物，如建筑物等）和马来西亚税务居民从中获得或将获得的任何利益、权属及收益。中国居民自马来西亚取得的此类所得（如租金）将被马来西亚内陆税收局征税。不同的是，马来西亚所得税法并未针对此类收入征收预扣税，因此中国居民需要进行纳税申报并缴税。

独立个人劳务(双边税收协定第 14 条)

该条涉及非就业报酬。中国居民个人在专业服务或其他独立性质的活动中获得的所得在中国和马来西亚应征税。马来西亚只能在下列情况下对所述所得征收所得税：

- 中国居民个人在一个历年内在马来西亚停留连续或累计等于或超过 **183** 天；或
- 无论中国居民个人在马来西亚的劳务报酬来自马来西亚居民，或由位于马来西亚的常设机构承担，该报酬在任何一个历年内超过 **4000** 美元或等值马来西亚林吉特或人民币。该情形下，中国居民个人在一个历年内在马来西亚停留连续或累计少于 **183** 天时仍然适用。

在上述情况下，可能适用于 **10%** 的马来西亚预扣税，中国居民需要进行纳税申报并缴税。

非独立个人劳务 (双边税收协定第 15 条)

该条涉及到就业报酬。中国居民个人因受雇所得的薪金，工资和其他类似报酬在中国应征税。当受雇工作在马来西亚进行的情况下，取得的薪酬也可能在马来西亚征税。

尽管如此，以下情况马来西亚没有征税权：

- 中国居民个人在马来西亚在一个历年内在马来西亚停留连续或累计少于 **183** 天；以及
- 薪酬由并非马来西亚居民的雇主支付或代表其支付；
- 薪酬并非由雇主在马来西亚的常设机构承担。

上述情况下马来西亚预扣税不适用，中国居民个人可能需要进行所得税申报。

董事费(双边税收协定第 16 条)

中国居民提供公司董事职能所获得的董事费和类似所得将会在马来西亚被征税。

马来西亚 **10%** 的预扣税将适用，同时中国居民可能被要求申报个人所得税。

结论

在双边税收协定未明确征税权归属的情况下，中国居民企业就其取得自马来西亚的所得可能需承担马来西亚和中国双重税负。但在符合特定条件的情形下，中国居民企业承担的马来西亚税负可用于抵免就同一项所得征收的中国税，从而消除双重征税。

在适用税收协定待遇之前，中国居民需要评估其是否符合双边税收协定所规定的所有条件及相关主管部门的实践。若未适用或错误适用上述协定待遇，则将增加中国以及/或马来西亚居民的支出并带来现金流影响。

您可以通过点击下列链接阅读中马双边税收协定全文。

<http://www.chinatax.gov.cn/n810341/n810770/c1153105/part/1153109.pdf>

我们将在下期税务月刊中介绍常设机构的概念及其对于双边税收协定中营业利润及技术服务费所得的影响。



Deloitte Malaysia Chinese Services Group Publication

Malaysia and China Double Taxation Agreement (DTA)

Introduction

Malaysia exercises its sovereign right to impose income tax via the Income Tax Act, 1967 ("the Act"). The basis of charge for Malaysian income tax is generally based on the source principle, i.e., income that is accrued in or derived from Malaysia shall be chargeable to Malaysian income tax. This principle is generally justified on the basis that the source of the income is located within the territorial borders of Malaysia, hence the right of Malaysia to impose income tax.

It is imperative to bear in mind that other countries also reserve their right to impose income tax and the basis of charge adopted may not necessarily be based on the source principle, e.g., residence status, nationality, citizenship or domicile of the taxpayer. As a result, taxpayers of those countries may be taxed on their worldwide income, hence the same income in the hands of the same person may be subject to double taxation, e.g., Malaysian-sourced income that is derived by a Chinese resident is taxed by Malaysia on the basis it was derived from Malaysia, and again by China by virtue of the taxpayer being a fiscal resident of China. Left unabated, incidences of double taxation could impede cross-border economic activities between both countries. As such, China and Malaysia concluded the Double Taxation Avoidance Agreement ("the DTA") for the purpose of eliminating or alleviating incidences of double taxation. Broadly, the DTA consists of 29 Articles, each covering subject matter such as the scope of the DTA, types of income and taxes covered, residence status, permanent establishment and methods to eliminate double taxation.

Interaction between the Act and the DTA

Malaysian income tax is imposed by the Act. In the event a Chinese resident 'generates' an income from Malaysia, it is required to assess whether that income is taxable in Malaysia in accordance with the provisions of the Act. Some of the elements to be considered are:

- Whether the income in question falls within the categories of income that are chargeable to Malaysian income tax; and
- Whether the income is derived from Malaysia.

Once it is determined that the income is taxable under the Act, the Chinese resident should then assess whether the income in question is derived from Malaysia in accordance with the DTA provisions. If affirmative, Malaysian income tax is certain and the Chinese resident should assess whether it qualifies for treaty benefits such as preferential tax rates, exemptions and tax credit.

Dividend, interest and royalties (Articles 10, 11 and 12 of the DTA respectively)

Interest and royalties derived by a Chinese resident from Malaysia should be liable to Malaysian income tax. The manner of tax collection is via Malaysian withholding tax that is deducted by the Malaysian payer and remitted to the Malaysian Inland Revenue Board. The default withholding tax rates provided for under the Act range from 10% to 15% of gross amount paid to the Chinese resident. The withholding tax treatments for dividend, interest and royalties derived by a Chinese resident from Malaysia are summarised below:-

Type of Income	Withholding Tax Rate under the Act	Withholding Tax Rate under the DTA
Dividend	0%	10% (Note 1)
Interest	15%	10% or 0% (Note 2)
Royalties	10%	10%

If the Chinese resident does not have a permanent establishment in Malaysia, the withholding tax serves as final tax and the Chinese resident is not required to file an income tax return. We shall discuss the concept of permanent establishment and its impact on interest and royalties income in the next publication.

Note 1: In certain instances, the DTA may state a rate higher than the rate provided for under the Act. As the purpose of the DTA is to eliminate or reduce incidences of double taxation, Malaysia may not rely on the DTA to impose taxes if the income in question does not fall within the scope of the Act or is exempted by the Act. Hence, where the domestic tax law (i.e., the Act) does not levy tax on dividend, even if the dividend tax rate is indicated as 10% under the DTA, no tax needs to be paid on dividend.

Note 2: On 1 November 2016, Malaysia and China signed an [Exchange of Notes](#) to the DTA. This Exchange of Notes, which comes into force and takes effect on 1

November 2016, lists out the institutions wholly owned by the respective Governments under Subparagraphs 5(a)(iv) and 5(b)(iii) of Article 11 (Interest) of the DTA that are eligible for tax exemption under Paragraph 4 of Article 11 (Interest) of the DTA. The institutions are:

In China

- the China Development Bank Corporation;
- the Agricultural Development Bank of China;
- the Export-Import Bank of China;
- the National Council for Social Security Fund;
- the China Export & Credit Insurance Corporation;
- the China Investment Corporation; and
- the Silk Road Fund Co., Ltd.

In Malaysia

- Export-Import Bank of Malaysia (Export-Import Bank Malaysia Berhad);
- National Trust Fund (Kumpulan Wang Amanah Negara);
- Retirement Fund (Kumpulan Wang Persaraan);
- Agricultural Bank of Malaysia (Agro Bank Malaysia Berhad);
- Small Medium Enterprise Bank of Malaysia (SME Bank Malaysia Berhad);
- Malaysia Development Bank (Bank Pembangunan Malaysia Berhad); and
- Khazanah Nasional Berhad.

With the aforesaid exemption, tax inefficiency arising from certain cross-border financing could be eliminated. For instance, a Malaysian subsidiary of a Chinese company that borrows from any Chinese institutions listed above is not required to withhold 10% tax on interest payable to the lenders. Such a welcome move is expected to greatly facilitate cross-border trades and investments between the two countries for mutual benefits.

Income from immovable property (Article 6 of the DTA)

In Malaysia, the term 'immovable property' is defined by Section 3 of the Interpretation Acts 1948 and 1967 as land (and anything attached or permanently fastened to the earth such as a building) and any interest in, right over or benefit arising or to arise out of land. Such income (e.g., rental) that is derived by a Chinese resident from Malaysia should be subject to Malaysian income tax, but as a distinction, the Act does not levy withholding tax. Instead, the Chinese resident is required to file an income tax return and account for tax accordingly.

Independent personal services (Article 14 of the DTA)

This deals with non-employment remuneration. Income derived by a Chinese resident individual in respect of professional services or other activities of an independent character is taxable in China and Malaysia. Malaysia may only impose income tax on the said income if:

- The Chinese resident individual was physically present in Malaysia for a period or periods amounting to 183 days or more in a calendar year; or
- The remuneration for his services in Malaysia is either derived from Malaysian residents or borne by a permanent establishment located in Malaysia and the remuneration exceeds USD4,000 equivalent in Malaysian Ringgit or Chinese Renminbi in a calendar year. This applies although the Chinese resident individual was not physically present in Malaysia for a period or periods amounting to 183 days in a calendar year.

In such instance, Malaysian withholding tax at the rate of 10% may be applicable and the Chinese resident individual may be required to file an income tax return.

Dependent personal services (Article 15 of the DTA)

This deals with employment remuneration. Salaries, wages and other similar remuneration derived by a Chinese resident individual is taxable in China. In the event the employment is exercised in Malaysia, the remuneration derived therefrom may also be taxed in Malaysia.

Notwithstanding, Malaysia does not have the taxing right if:

- The Chinese resident individual is physically present in Malaysia for a period or periods amounting to 183 days or less in a calendar year; and
- The remuneration is paid by, or on behalf of, an employer who is not a resident of Malaysia; and
- The remuneration is not borne by a permanent establishment which the employer has in Malaysia.

Malaysian withholding tax should not be applicable and the Chinese resident individual may be required to file an income tax return.

Directors' fee (Article 16 of the DTA)

Director's fees and similar payments derived by a Chinese resident individual in his capacity as a director of a company which is a resident of Malaysia may be taxed in Malaysia.

Malaysian withholding tax at the rate of 10% may be applicable and the Chinese resident individual may be required to file an income tax return.

Conclusion

In the event the DTA does not allocate exclusive taxing rights to either Malaysia or China, the Chinese resident may suffer Malaysian and Chinese taxes on income derived from Malaysia. Provided all the conditions are fulfilled, the Malaysian tax suffered by the Chinese resident may be credited against the Chinese tax imposed on the same income – thereby eliminating double taxation.

Prior to claiming treaty benefits, the Chinese resident is required to assess whether it fulfils the conditions imposed under the DTA as well as the practice of the relevant authority. In the event such benefits were not claimed or erroneously

claimed, it will result in increased cost and cash flow implications to the Chinese and/or Malaysian resident.

You can access the full text of the DTA via the following link
<http://www.chinatax.gov.cn/n810341/n810770/c1153105/part/1153106.pdf>

We shall examine the concept of permanent establishment and the effect of the DTA on business profit and technical fee income in our next publication.

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