Deloitte Tax Max – The 44th Series
#ReadyMalaysia2019: A refreshed landscape

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Navigating the transfer pricing and international tax landscape confidently

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Budget amendment - Transfer Pricing
Expansion of ‘control’- Transfer Pricing

Satisfy either of the following economic control conditions -
- **IP control** – Dependence upon IP
- **Business activities control**- Influence on the pricing and other conditions
- **Management control** – Appointment of one or more than one Director / BoD
Managing TP in post-BEPS era
Typical supply chain

**Essence of TP position:**
- Key profit drivers (risk, valuable IP) are placed with Principal, who receives entrepreneurial returns
- Other entities perform routine functions
The “Evolved” value chain

Pre-production (IP oriented)

Post-production (supply/market oriented)

Production (implementation oriented)
Royalty vs service fee
Why is it important to differentiate?

Treaty rate

Royalty vs Service income

Withholding tax filing

Withholding tax rate

Location of services

Position

- Prior to 17 Jan 2017
- 17 Jan 2017 to 5 Sep 2017
- Post 6 Sep 2017 - Income Tax (Exemption)(No.9) Order 2017
Redefinition of “royalty” under Finance Act 2017
Potential payments that may fall under new definition of royalty payments

Definition widened. “Royalty” includes, amongst others, any sums paid as consideration for, or derived from:

a) The use of, or the right to use in respect of, any copyrights, software, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks or other like property or rights.
   - Payment for use of software
   - Purchase of software?

(d) The reception of, or the right to receive, visual images or sounds, or both, transmitted to the public by (i) satellite; or (ii) cable, fibre optic or similar technology
   - Movies or music streamed via the internet or received via satellite.
   - E.g. iTunes, Netflix, Spotify, Amazon, Google Play

(e) The use of, or the right to use, visual images or sounds, or both, in connection with television broadcasting or radio broadcasting, transmitted by (i) satellite; or (ii) cable, fibre optic or similar technology
   - Payments made by satellite TV, cable TV or online streaming TV operators to non-residents for right to broadcast movies or music which are transmitted via satellite or internet

(f) The use of, or the right to use, some or all of the part of the radio frequency spectrum specified in a relevant licence
   - Payment in relation to spectrum licences (including rights to use such licences) to non-resident who holds the relevant licence
Managing disputes in post-BEPS era
### Key challenges

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What can taxpayers do?

Key enablers:
- People
- Process
- Technology
- Data

Traditional Transfer Pricing Services
Operational Transfer Pricing

TP Lifecycle:
- Business Model
- Planning / Ex-ante Documentation
- Defend
- (Ex-post) Documentation

Process:
- Monitoring & Data Analytics
- Calculate
- Policy

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2017 MAP statistics (OECD)
Treaty shopping and PE risk
BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (cont’d)

Example A (Pre – BEPS era)

Post BEPS era – Will this pass the Principle Purposes Test (“PPT”)?
Action 7: Permanent Establishment (PE)
Changes to Article 5 of Tax Treaty

Article 5(5) (Agency PE)

Why would MNCs use a marketing company?

- Client’s management?
- Tax arbitrage?

Marketing service

R

S

Tax rate 16.5%

Tax rate 24%

Communication

Customers

Marketing company

Principal
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