

Feeling the Heat of FATCA in Malaysia



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The world of finance is constantly changing. With mounting globalisation, accelerated mergers and restructuring activities, complex lending and investment issues, and shifting industry regulations, many of us in Malaysia have lost track of the tax developments happening both nationwide and globally. Without us even noticing, some of the global tax developments truly affect us as an individual as well as the company that we are working for. One of these global tax developments that this article will focus on is FATCA.

What is FATCA?

The Foreign Account Tax Compliance Act (“FATCA”) which has been in effect since July 2014 is a US federal law introduced by the United States Department of Treasury (US Treasury) and the US Internal Revenue Service (IRS). It is intended to detect and deter the evasion of US tax by US persons who hide money outside the US. Unlike the Malaysian tax system whereby Malaysian persons are generally only taxed on income sourced from Malaysia, the US tax system imposes tax on US persons on both sources from the US and outside the US.

There is a common misconception among businesses and individuals that FATCA only affects US citizens. Financial institutions (“FI”) which fall under the FATCA scope would include:

- Those in the banking business;
- Those who perform custodial services e.g. nominee companies or trustees;
- Investment entities e.g. unit trust companies, private equity companies;
- Life insurance companies;
- Holding companies or treasury centers

The FATCA enables the IRS to obtain information on those US taxpayers holding financial assets or investments outside the US by requiring the FI outside the US (including Malaysian FI) to periodically transmit and report certain information to the IRS. Failure to do so may lead to the imposition of a 30% withholding tax on payments on certain types of income from the US.

FATCA development in Malaysia

The US has developed Inter Governmental Agreement (“IGA”) models as tools to facilitate financial institutions’ compliance with the FATCA. An IGA will require FI to provide information on US accounts which they hold. At the moment there are two types of IGA developed.

Model I - Under this model the FI outside the US will report account information of US persons to their relevant domestic authority [in this case the Malaysia Inland Revenue Board (“MIRB”)]. The MIRB will in turn provide the information to the US IRS.

Model II - Under this model the FI outside the US will directly report the account information of the US persons to the US IRS directly.

At the time this article was written, Malaysia has yet to sign an IGA with the US, yet Malaysia is one of the countries that have reached an agreement in substance with the US on 30 June 2014. Accordingly, Malaysia is listed in the US Treasury’s list of jurisdictions as having an IGA in effect with the US. Concerted efforts have been made by the Ministry of Finance (MOF), Bank Negara Malaysia (BNM) and the MIRB to create awareness and obtain feedback among the financial services industry players pertaining to the FATCA.

The MIRB has issued draft guidance notes on FATCA on 15 March 2015 to assist Malaysian financial institutions (MYFIs) to comply with the requirements under the Malaysia-US IGA. Following the comments and feedbacks received from the public, a revised draft guidance notes was issued on 11 September 2015. It is expected that the guidance notes will be finalised in line with the signing of the Malaysia-US IGA expected to be by the end of 2015.

Under the terms of the Malaysia-US IGA, reporting MYFIs will submit the requisite account information of US persons to the MIRB, which will then be exchanged with the US IRS. Pending the finalisation of the guidance notes and the signing of the Malaysia-US IGA, the MIRB has deferred the deadline for submission of the 2014 reportable information under FATCA from 30 June 2015 to 30 June 2016. However, the date for submitting the 2015 reportable information remains the same, that is 30 June 2016.

Why should I be bothered with FATCA?

Unless one is in the financial services industry in Malaysia, one may not realise the development of FATCA in Malaysia. Most, if not all, of the banks and financial institutions have reengineered their account opening procedures to embed the due diligence requirements under FATCA with the objective of obtaining the necessary data or information to be reported to the MIRB. You may or may not notice that in many of your recent applications with banks and financial institutions in Malaysia, e.g. saving accounts opening,

credit card application, etc., there are questions on FATCA embedded in the relevant form(s) issued by the banks or financial institutions. Some even require their customers, be it individual or companies, to make self-declaration that the customer is not a US person. Some customers, especially companies, have also been asked to provide the MYFIs with certain forms issued by the US IRS (e.g. Form W8-BEN, Form W8-BEN-E, Form W9 etc.) for self-certification purposes. There are plenty of technical jargons used in these forms, which may lead many of us to make the wrong declarations and/or certifications to the MYFIs.

The MYFIs have also started their due diligence procedures to remediate their existing account holders' details as at 30 June 2014 to identify US persons in their existing customer database. Several letters and notifications have been issued to the customers of these MYFIs to provide certain information as well as filling up certain US forms as mentioned above.

The MYFIs may approach the aforementioned due diligence procedures differently with views on achieving the same objective: their compliance with the FATCA.

Our local FIs will need to take a hard look at their systems implementation processes and assess the impact of FATCA on their organisation, which will include resources needed to support the implementation and monitoring processes.

How can Deloitte Tax Malaysia help you?

Our FSI tax specialists who have hands-on industry experience and knowledge on FATCA coupled with the strength of our worldwide network enable us to assist you in handling the FATCA challenges especially in dealings with the requests made by the MYFIs pertaining to FATCA. We have assisted many of our clients in performing analysis on their entities' classification under FATCA for the self-certification purposes as well as providing guidance on how to complete the US forms for submission to the MYFIs and even to their business counterparts.