

## **International Taxation in Doing Business in Myanmar**

This article looks at a few international tax issues that investors keen on investing in Myanmar need to consider.

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Myanmar has a population of over 60 million people, a land area of more than 676,000 square kilometres, and a coastline of more than 2,800 kilometres. As its economy continues to expand at a rate of 7 per cent to 8 per cent per year over the next decade or more,<sup>1</sup> investors have developed a keen interest to enter its domestic market, and hope to make handsome gains.

As with all business undertakings, the potential rewards come with various risks, both fiscal and non-fiscal. The fiscal risks include taxation, both domestic and international. This brief article looks at a few international tax issues the investor may need to consider.

### **Tax System**

Before dealing with international tax, a basic understanding of Myanmar's tax regime may be useful. There are fifteen kinds of taxes and duties levied by the government, mainly under two departments in the Ministry of Finance and Revenue. These are the Internal Revenue Department ("IRD") and the Customs Department. The IRD administers income tax,<sup>2</sup> commercial tax,<sup>3</sup> profit tax,<sup>4</sup> lottery tax<sup>5</sup> and stamp duty.<sup>6</sup> Of the five revenues administered by the IRD, three relate to taxation of businesses, namely income tax, commercial tax and profit tax.

Generally, income tax<sup>7</sup> is payable by companies, individuals, firms or any other association of persons on the total income accruing in or derived from all sources in and outside Myanmar. Income tax is charged as corporate income tax, individual income tax, capital gains tax and also collected as withholding tax. Corporate income tax is charged at the rate of 25 per cent<sup>8</sup> for Myanmar companies,<sup>9</sup> foreign-owned resident companies, joint ventures and non-resident foreign companies engaged in certain State sponsored projects. For non-resident companies, present in Myanmar through a branch, the corporate income rate is 35 per cent, unless the branch has been granted an investment permit by the Myanmar Investment Commission ("MIC") in which case the corporate tax rate is 25 per cent.

Lest it be thought that there is income in some form that escapes taxation, this is not so. Should a person have taxable income not covered by the Income Tax Law this would be subject to tax under the Profit Tax Law.<sup>10</sup> Profit tax is based on profits and capital gains of unincorporated private businesses and income of self-employed individuals. On the other hand, commercial tax<sup>11</sup> is a form of sales tax levied on goods and services and collected at each stage of the production and distribution process, and applying to all sectors of the economy, whether public, private or co-operatives.

In relation to relief for international double taxation, it is only the income tax imposed under the Income Tax Law that is regarded as Myanmar tax under its double taxation agreements.

### **Tax Treaty Network**

Myanmar currently has a network of 10 double taxation agreements<sup>12</sup> ("DTAs"). Besides

Singapore, Myanmar has signed DTAs with Bangladesh, India, Indonesia, Laos, Malaysia, South Korea, Thailand, United Kingdom and Vietnam.<sup>13</sup> Singapore's DTA with Myanmar entered into force on 26 June 2009,<sup>14</sup> although the treaty negotiations had been concluded and the text was signed some 10 years before that on 23 February 1999. However, Myanmar's recent drive to enlarge its tax treaty network is evidenced by its DTA with neighbouring Thailand, which came into force on 1 January 2012.

The Myanmar tax authorities have started to consider applications for relief under DTAs from the release of notifications in August 2011. Although treaty relief has become part of the administration of international taxation in Myanmar, the number of cases has been relatively low.

### **Claiming Relief from International Double Taxation**

Certain tax issues that may arise for a foreign investor from Singapore doing business in Myanmar are discussed below. The starting point, for a person to be eligible for relief from double taxation under the DTA, is that the person claiming relief must be a tax resident of Myanmar or Singapore, or both.<sup>15</sup> Having crossed this threshold, the DTA would apply to such persons. However, whether and how any particular article dealing with a specific type of income, such as business profits, interest, or royalties, operates depends on the provisions and interpretation of that article and its application to the given fact situation.

### ***Exemption for Government Entities***

Singapore institutions interested in lending funds to persons in Myanmar may wish to note that there is a specific exemption for interest<sup>16</sup> arising in Myanmar and paid to the "Government of Singapore".<sup>17</sup> The meaning of the "Government of Singapore" is extended to include "a statutory body or any institution wholly or mainly owned by the government of Singapore, as may be agreed from time to time by the competent authorities" of Singapore and Myanmar. Getting onto the agreed list of institutions may be a worthwhile endeavour, although what constitutes "an institution" which is "mainly owned by the Government of Singapore" may be in issue, necessitating clarification from the Ministry of Finance.

### ***Form of Business Presence***

The private limited company is the most common vehicle for doing business in Myanmar. This can be a local subsidiary which is resident in Myanmar and incorporated under the Myanmar Companies Act,<sup>18</sup> wholly owned by a foreign investor. The particular choice of vehicle may be not just influenced, but determined by the kind of business activity envisaged. Under Myanmar's Foreign Investment Law<sup>19</sup> ("FIL"), all foreign investment projects require approval from the MIC as well as a permit issued by MIC. Whether it is incorporation of a local subsidiary or registration of a foreign branch, it would be prudent to first ascertain from the MIC through enquiries, what sort of presence is sanctioned before proceeding with establishing the necessary presence. If the proposed business activity is the importation of goods for sale in Myanmar, ie trading in Myanmar, this is prohibited for foreign companies.

An alternative vehicle is a joint venture enterprise with a government entity. The foreign investment law has been recently revised upwards to increase the limit of foreign ownership from 35 per cent to 49 per cent or 50 per cent – the Myanmar Parliament is set to review this further.

In certain sectors, the form of business presence may be better served through a contract for service in Myanmar by a local party. Whichever form of presence is decided upon and

implemented, unless exemption is granted, there will be tax impacts for the foreign investor arising from the structure chosen. Reduced tax rates are available for the appropriate business vehicle engaging in qualifying business activities. For example, in selling shares or an oil and gas interest, the gains derived by a non-resident of Myanmar can range from 40 per cent to 50 per cent, but may be reduced under the DTA with Singapore to a 10 per cent tax rate, where the participation of the foreign investor is at least 35 per cent and the alienated shares do amount to a minimum 20 per cent holding, subject to conditions.

### ***Permanent Establishment***

A permanent establishment ("PE") is an actual or deemed presence of a non-resident in the source country (eg a branch in Myanmar) being a fixed place of business where business is wholly or partly carried on, amounting to a taxable presence. A PE especially includes a place of management, a branch, an office, a factory and a workshop. In relation to oil and gas, and mining sectors, a PE includes a mine, an oil or gas well, and a quarry or any other place of extraction of natural resources.<sup>20</sup> A PE also includes an installation, structure, drilling rig or ship used for the exploration or exploitation of natural resources, but only if such exploration or exploitation is not preliminary or preparatory in nature. Apart from the nature of the activity, there is a *de minimis* rule such that the presence has to be beyond a certain length of time to amount to a PE. The scope of PE is generally restricted under Myanmar's DTA to a presence exceeding six months.<sup>21</sup> This applies to a building site, a construction, assembly or installation project or connected supervisory activities associated with them.<sup>22</sup>

A PE is also constituted by the furnishing of services, including consultancy services, by a foreign person through employees or other personnel engaged by him, where the services are provided in Myanmar for a period or periods exceeding six months in any 12 month period.<sup>23</sup> A PE is deemed to arise where certain kinds of agents are used to carry on business in Myanmar. This occurs where the agent is not an agent of an independent status who is a broker, general commission agent or any other independent agent acting in the ordinary course of his business.<sup>24</sup> In other words, where the agent is a dependent agent, a PE is likely to arise. The significance of a PE arising is that a Singapore resident who carries on business in Myanmar through an actual or deemed PE becomes taxable in Myanmar upon his business profits, which are directly or indirectly attributable to that PE.<sup>25</sup> Thus, an important international tax issue lies in ascertaining whether a PE exists, in any shape or form.

### ***Withholding Taxes***

Under the Myanmar Income Tax Law, both resident and non-residents are subject to withholding taxes, but at different rates. Withholding tax on payments to residents is not a final tax, but withholding tax on payments to non-residents is a final tax. The point at which the withholding obligation arises is at receipt of the payment or at accrual. The rates for withholding can range from 3.5 per cent to 15 per cent,<sup>26</sup> depending on the type of income being paid, eg interest, royalties and payments under contract with various entities. There is no withholding tax on dividends.

For payments of interest, the withholding rate for resident citizens and resident foreigners is 15 per cent. For non-resident foreigners, the withholding rate is 15 per cent. For royalties paid for the use of licence, trade marks, patent rights, etc, the withholding rate for payments to resident citizens and resident foreigners is 15 per cent. For payments to non-resident foreigners, the withholding rate is 20 per cent. For payments made for procurement of goods, the withholding rate for payments to residents is 2 per cent, and that for payments to non-residents is 3.5 per cent. In relation to rendering of services,

payments to residents attract withholding tax at the rate of 2 per cent. Payments to non-residents for services rendered attract withholding tax at the 3.5 per cent rate.

Obtaining a reduced withholding rate is not necessarily a simple exercise, as the relevant tax authority allowing the reduced rate would be concerned to enquire into the background of the claimant and its tax residence, particularly among related parties to guard against round-tripping and other improper means of getting treaty benefits.

### ***Exchange of Information***

The DTA adopts the international standard for exchange of information then prevailing in 1999, not the later 2005 standard.<sup>27</sup> This means that the Myanmar or Singapore tax authority<sup>28</sup> can only exchange information concerning taxes covered by the DTA, ie income tax imposed under the Myanmar Income Tax Law and Singapore income tax, and not other taxes.<sup>29</sup> Additionally, the information sought by either country can only be in respect of persons who are resident in one or both countries. The information obtained is to be treated as secret in the same manner as information obtained under domestic tax laws. Such information can be disclosed only to persons or authorities (including Courts and administrative bodies) involved in the collection of, the enforcement or prosecution in respect of, or determination of appeals in relation to, taxes covered by the DTA.

In dealing with a request from the other country, the requested tax authority is not obliged to carry out administrative measures at variance with the laws and administrative practices of itself or the other country.<sup>30</sup> Additionally, the requested tax authority is not obliged to supply information which is not obtainable under the laws or in the normal course of administration of itself or the other country.<sup>31</sup> To protect business secrets or trade information, the requested tax authority is also not obliged to supply information which would disclose any business or official secret or trade process, or information, where such disclosure would be contrary to public policy.<sup>32</sup>

### ***Dispute Resolution Mechanism***

Where a person who is a resident of Singapore considers that due to the actions of either or both Singapore and Myanmar, he has been taxed otherwise than in accordance with the DTA, he may, despite any remedies available under the domestic tax laws of either country, present his case to the competent authority of Singapore.<sup>33</sup> There is a time-limit imposed under the DTA for presentation of the case. The case must be presented within three years from the “first notification of the action resulting in taxation not in accordance” with the DTA, eg receipt of a notice of assessment.

The next stage is for the competent authority of Singapore to examine the objection to see if it appears to be justified. If the objection appears to be justified, and the competent authority of Singapore is unable to arrive at a satisfactory solution itself, it has to resolve the case by mutual agreement with the competent authority of Myanmar. Unfortunately, no time limit is specifically imposed by the DA upon the competent authorities within which to reach a satisfactory solution. This leaves the foreign investor (taxpayer), with international tax issues and/or two unwelcome tax burdens, having to rely on the method and manner of co-operation between the competent authorities of Singapore and Myanmar to resolve the case, while he plays no direct role.

However, as the taxpayer is not precluded from seeking remedies under the domestic tax laws of the country in which he is resident, a person who is a resident in Singapore can nonetheless pursue any objections, eg to the notice of assessment from the Comptroller of Income Tax, by the usual avenues of redress through the appeal system, first to the Income Tax Board of Review, and then if dissatisfied with the decision of the Board to the

High Court and ultimately to the Court of Appeal in Singapore. In the situation where it is the Myanmar income tax that is in issue, then it is the dispute resolution mechanism under the Myanmar Income Tax Law that is applicable.

### **Claiming Exemption for Income from Myanmar Received in Singapore**

Having earned the income in Myanmar, the foreign investor faces the issue of bringing it back to Singapore, preferably tax-free. Apart from treaty benefits, the tax issue also arises under domestic tax law, ie the Singapore Income Tax Act.<sup>34</sup> Foreign-sourced income kept outside Singapore is not subject to Singapore income tax<sup>35</sup>. Income finding its way back to Singapore may be taxable as being “received in Singapore from outside Singapore”. An extended meaning has been given to this phrase,<sup>36</sup> such that any amount from any foreign-sourced income, ie not the income itself, becomes subject to tax when brought back to Singapore in certain ways. There are three types of situations involved. The first is where any amount from any foreign-sourced income is remitted to, transmitted or brought into Singapore. The second, particularly important for businesses trading in Singapore and in Myanmar, is where any amount from any foreign-sourced income is applied in or towards satisfaction of any debt incurred in a trade or business carried on in Singapore. The third is where any amount from any foreign-sourced income is applied to purchase movable property, eg jewellery, gold bars, precious stones, which is brought into Singapore.

Set against this broad scope of foreign-sourced income which is taxable in Singapore, exemption from tax is available for certain types of foreign income received in Singapore, which meet qualifying conditions.<sup>37</sup> The three types of income are foreign dividends, foreign branch profits of a company tax resident in Singapore, and income from professional, consultancy and other services derived outside Singapore.<sup>38</sup> There are three basic conditions to be satisfied cumulatively for each type of foreign income sought to be brought within the exemption provisions.<sup>39</sup> The first is that the foreign income must have been “subject to tax of a similar nature” in the foreign country. Myanmar’s income tax obviously qualifies, but it is not so clear where its profit tax is involved. By way of administrative concession, foreign income which is exempt in Myanmar due to a tax incentive for carrying out substantive business activities may be regarded as having passed this “subject to tax” test. The second condition essentially is that at the time the foreign income is received in Singapore by the person tax resident in Singapore, the highest rate of “tax of a similar character to income tax” under that foreign country’s law for trade or business profits, ie corporate profits, is at least 15 per cent. This involves an assessment of both qualitative and quantitative factors. The third condition, which may appear unusual, is that the Comptroller of Income Tax must be satisfied that the tax exemption would be beneficial to the person tax resident in Singapore. This suggests that the very fact of the tax exemption being in and of itself beneficial to a taxpayer in that his tax burden is reduced, ie he pays less tax, which may not necessarily be a sufficient benefit as far as the Comptroller is concerned.

Further or other specific reliefs or exemptions may be available against taxation on foreign income repatriated to Singapore, whether by law or by administrative concession, depending among other things, on the nature of the foreign income and the type of taxpayer.

### **Conclusion**

Harking back to the source of the foreign income arising in Myanmar, with the FIL due for review and amendment, and other possible attendant legislative and administrative (including tax) changes afoot, the foreign investor looking to venture into Myanmar, or already present there, would need to be familiar with the latest legal and tax

environments. Additionally, he should look out for further regulatory developments during the life of the business activity as well as at the end of the business life cycle, when he exits and leaves Myanmar.

### **About Mr S Sharma\***

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Sharma has been identified as a leading individual in Singapore's corporate tax market by *Who's Who Legal Singapore 2008* as having worked extensively with IRAS and is also highly recognized for his knowledge of the tax aspects of corporate restructurings and handling of both contentious and non-contentious work. Sharma also advises on international tax and acts for clients in court cases, including on EOI.

With more than 25 years of practical legal and tax experience from working in the public and private sectors, Sharma has honed his knowledge and skills when it comes to dissecting tax issues.

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*The views expressed in this article are solely those of the author, do not constitute legal advice and do not represent the views of ATMD Bird & Bird LLP or its clients.*

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#### **Notes**

- 1 See *Business Times*, September 11, 2012, p 23, citing ADB sources.
- 2 This is done under the Income Tax Law (1974).
- 3 This is done under the Commercial Tax Law (1990).
- 4 This is done under the Profit Tax Law (1976).
- 5 This is done under the Directive pertaining to State Lottery.
- 6 This is done under the Court Fees Act (1870) and the Myanmar (Indian) Stamp Act (1899).
- 7 Besides the Income Tax Law itself, the assessment and collection of income tax is supplemented by the Income Tax Regulations, State Budget Law and Notifications issued from time to time.
- 8 The 25 per cent rate applies from 1 April 2012. The rate was previously 35 per cent.
- 9 Corporations incorporated in Myanmar are regarded as tax residents and taxed on income accruing or arising in Myanmar and outside Myanmar.
- 10 Although, if the person wishes to be assessed under the Income Tax Law he can apply to the State/Divisional Officer to pass an order to be so assessed.
- 11 The Commercial Tax Law Act replaced the previous Commodities and Services Tax Law. The tax rates range from 0 per cent to 200 Per cent.
- 12 The term Double Taxation Agreement is short-hand for a more complete description of the Agreement, which is an Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income.

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- 13 The DTAs with Bangladesh, Indonesia and Laos although signed, are not in force.
  - 14 The effective dates are 1 January 2010 for Singapore, ie Year of Assessment beginning on or after 1 January 2011, and 1 April 2010 for Myanmar, ie Year of Assessment beginning on or after 1 April 2011.
  - 15 See art 1 of the Singapore-Myanmar DTA. See further, art 4 on the test for residence, both for an individual and for a "person other than an individual".
  - 16 See arts 11(3) and 11(4) of the Singapore-Myanmar DTA. Of course, this also works the other way around, if the lender is from Myanmar. See further, art 11(7) on when interest is deemed to arise.
  - 17 These provisions in arts 11(3) and 11(4) of the Singapore-Myanmar DTA are not found in the OECD Model Tax Convention on Income and on Capital.
  - 18 Myanmar Companies Act 1913. The most common form is an LLC.
  - 19 Myanmar Foreign Investment Law 1988 and its Procedures.
  - 20 See art 5(2) of the Singapore-Myanmar DTA.
  - 21 The Myanmar-India DTA has a longer period of presence exceeding 270 days to amount to a PE.
  - 22 See art 5(3)(a) of the Singapore-Myanmar DTA.
  - 23 See art 5(3)(b) of the Singapore-Myanmar DTA. Similar provisions are found in Myanmar's DTAs with South Korea and with Vietnam.
  - 24 See art 5(5) read with Article 5(7) of the Singapore-Myanmar DTA.
  - 25 See art 7(1) of the Singapore-Myanmar DTA.
  - 26 <sup>26</sup> Under Notification 167/2011 effective from 26 August 2011.
  - 27 The international standard for exchange of information is set under art 26 of the OECD Model Tax Convention on Income and on Capital.
  - 28 Referred to as the "competent authorities" in art 27 of the Singapore-Myanmar DTA.
  - 29 See art 27(1) of the Singapore-Myanmar DTA.
  - 30 See art 27(2)(a) of the Singapore-Myanmar DTA.
  - 31 See art 27(2)(b) of the Singapore-Myanmar DTA.
  - 32 See art 27(2)(b) of the Singapore-Myanmar DTA.
  - 33 See art 26(1) of the Singapore-Myanmar DTA. Under art 3(1)(i), the competent authority in the case of Singapore is the Minister for Finance or his authorised representative.
  - 34 Chapter 134 (2008 Revised Edition)(Act).
  - 35 Section 10(1) of the Act imposes tax on income accruing in or derived from Singapore, and income received in Singapore from outside Singapore.
  - 36 See s 10(25) of the Act.
  - 37 See ss 13(8) to 13(11) of the Act.
  - 38 See s 13(8) of the Act.
  - 39 See s 13(9) of the Act.