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Malaysia

FIRST CORRUPTION CHARGE UNDER NEW CORPORATE LIABILITY PROVISION

マレーシアの贈収賄規制において法人処罰規定（いわゆる両罰規定）が導入されたことは既報の通りであるが、本稿では、この法人処罰規定が適用されてマレーシア法人が贈収賄規制違反で処罰された初のケースについて紹介する。

Background

As previously stated in our August 2018 and February 2019 Editions of the NO&T Asia Legal Review[1], Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (“**MACC Act**”) which introduces the concept of corporate liability on commercial organizations regardless of whether they had actual knowledge of the corrupt actions of its associated persons came into force on June 1st, 2020.

Pristine Offshore Sdn. Bhd. (“**POSB**”), an offshore vessel support company became the first commercial organization in Malaysia to be charged under the newly introduced Section 17A of the MACC Act on March 18th, 2021.

Facts of the case against POSB

POSB was charged with one (1) count of bribery involving RM321,350.00 given by it to ensure that it was awarded a subcontract from Petronas Carigali Sdn. Bhd. (“**Petronas**”). Along with POSB, its former director, Chew Ben Ben was also charged with one (1) count of bribery under Section 16(b)(A) of the MACC Act.

According to the charge sheet, the bribe was allegedly given to Mazrin Ramli, the Chief Operating Officer of Deleum Primera Sdn. Bhd. as a reward to ensure POSB was awarded with the subcontract from Petronas. The subcontract that was promised to POSB was for the provision of workboat, master and crew and other associated marine services and offshore support related to the workboat, together with other marine support spread for maintenance, construction and modification services for Petronas.

The offense was allegedly committed between June 29th, 2020 and October 14th, 2020. Section 17A of the MACC Act came into force on June 1st, 2020.

1 In our articles titled *“MALAYSIA – CORPORATE LIABILITY INTRODUCTED FOR CORRUPTION OFFENCES”* and *“MALAYSIA’S CORPORATE LIABILITY UNDER THE MALAYSAN ANTI-CORRUPTION COMMISSION ACT 2009 EFFECTIVE 1ST JUNE 2020 – ADEQUATE PROCEDURES GUIDELINES ISSUED”*

Application of Section 17A on POSB

Section 17A provides that "*if a person associated with the commercial organization corruptly gives, agrees to give, promises, or offers to any person any gratification either for the benefit of that person or another person with intent to obtain or retain business for the commercial organization or to obtain or retain an advantage in the conduct of business for the commercial organization, the commercial organization commits an offence*". Further, if a person is, *inter alia*, a director of the commercial organization, that person will be deemed to be associated with the commercial organization.

Applying the abovementioned provision to this case, it can be said that POSB had, in association with its then director, Chew Ben Ben, corruptly given RM321,350.00 to Mazrin Ramli, as a reward to secure the subcontract for POSB.

Potential Penalties

Upon conviction, POSB will be liable for a fine of not less than ten times the value of the gratification (in this case, approximately a maximum of RM3,213,500.00), or RM 1 million, whichever is higher, or imprisonment of the directors and management of POSB for a term not exceeding 20 years, or both.

Defense Available to POSB

To recap, pursuant to Section 17A(4) of the MACC Act, if the commercial organization could prove that it had adequate procedures in place to prevent such associated persons from carrying out the corrupt conduct, then it can amount to a defense. The burden is now on POSB to prove that it had adequate procedures in place to prevent the corrupt acts committed by its former director, Chew Ben Ben.

The Guideline on Adequate Procedures ("**Guideline**") sets out the fundamental measures that may be adopted by commercial organizations to minimize the risk of corruption and to understand what adequate procedures should be implemented to prevent the occurrence of corrupt practices in their business activities.

The Guideline outlines the five guiding principles of T.R.U.S.T. which are summarized as follows:

1. **Top Level Commitment**

   Responsibility of top level management to ensure that the commercial organization essentially practices the highest level of integrity and ethics. This includes establishing, maintaining and periodically reviewing its anti-corruption compliance program and issuing instructions on communicating its anti-corruption policies and commitments to both internal and external parties.

2. **Risk Assessment**

   A comprehensive risk assessment is recommended to be done every three (3) years, with intermittent assessment conducted when necessary. The assessment may include assessment on opportunities for corruption and fraud activities resulting from weaknesses in the organization's governance framework and internal systems / procedures.

3. **Undertake Control Measures**

   A commercial organization should put in place appropriate controls and contingency measures that are reasonable and proportionate to the nature and size of the organization. These should include, among others conducting due diligence on any relevant parties or personnel prior to entering into any formalized relationships.

4. **Systematic Review, Monitoring and Enforcement**

   The top level management should ensure that regular reviews are conducted to assess the performance, efficiency and effectiveness of its anti-corruption program. Such reviews may take the form of an internal audit or an audit carried out by an external party.

5. **Training and Communication**

   The commercial organization's anti-corruption policy should be made publicly available and communicated to all personnel and business associates. Adequate training should be provided to employees and business associates to ensure thorough understanding of the commercial organization's anti-corruption position.

Conclusion

This new case portrays the MACC's commitment to enforce the provisions of the newly introduced Section 17A and it may well be the first of many charges that may be brought against commercial organizations for corrupt acts committed by persons associated with such commercial organizations.

Companies that have not adopted adequate procedures to prevent corrupt acts as recommended by the Guideline should consider deploying its resources to develop policies and framework for compliance with the Guideline and provisions of the MACC Act.

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Singapore

AMENDMENTS TO THE ELECTRONIC TRANSACTIONS ACT

2021 年 3 月 19 日、シンガポールでは改正電子取引法が施行された。同法は、UNCITRAL の電子的な譲渡可能な記録に関するモデル法（MLETR）を採り入れる形で改正されたものである。MLETR の目的は、国内及び国境を越えた電子的な譲渡可能記録の法的利用を促進することであり、今回の電子取引法の改正は、デジタル経済とデジタル社会の構築を目指すシンガポール政府の構想に沿うものと評価できる。

Introduction

On 19 March 2021, new amendments to the Electronic Transactions Act ("**ETA**") came into force, which, among others, adopted the UNCITRAL Model Law on Electronic Transferable Records (with modifications) ("**MLETR**"). The purpose of the MLETR is to facilitate the legal use of electronic transferable records both domestically and across borders, which largely affects shipping and international trade. These amendments are in line with the Singapore Government's larger initiative to build a digital economy and digital society.

Background of the ETA

The ETA was first enacted in 1998 to provide legal certainty for digital transactions, which supports legal enforceability of electronic records and signatures. The ETA provides for the legal recognition of electronic records, and expressly allows for them to satisfy any requirement for writing in the written law. An electronic signature is recognized as long as a reliable method can be used to identify the person and to indicate that person's intention with respect to the information contained in the electronic record. This paved the way for contract formation over email correspondence, and the practice of sending a scanned copy of an executed signature page via email or fax to seal the deal.

The ETA also sets out a framework for secure digital signatures, with the Infocomm Media Development Authority ("**IMDA**") as the authority overseeing the licensing for authentication and certification service providers. However, digital (as opposed to electronic) signatures certified by accredited certification providers are not mandatory for legal validity or recognition, and the commercial decisions as to the level of security and risks that businesses were prepared to accept are left to the users and usually dependent on the value of the transaction. As of the date of this publication, there is only one accredited certification authority in Singapore.

While the ETA is generally applicable in commerce, it does not apply to, among others, the creation or execution of deeds, wills, trusts, powers of attorney and transactions relating to immovable property.

Model Law on Electronic Transferable Records

The MLETR furthers the Singapore Government's drive to build a digital economy. The MLETR is progressive because it seeks to facilitate the use of transferable documents electronically. Transferable documents are used extensively in international trade, in particular by the shipping, logistics and finance industries.

Before the adoption of the MLETR in Singapore, the ETA had expressly excluded the application of certain parts of the statute to transferable documents. The rationale behind the exclusion stemmed from concerns of unauthorized duplication of transferable documents that could have dire consequences as large or high value goods are often involved; the current practice is to manage the risks by limiting the number of copies of physical transferable documents in circulation. The new amendments will now enable the creation and use of electronic Bills of Lading ("**eBLs**"), that would be functionally equivalent to paper-based bills of lading. The amendments even allow for change of medium for transferable documents, i.e. from electronic to physical documents, recognizing that the movement towards paperless with international trading partners would not happen overnight. This move towards eBLs is expected to increase costs savings through reducing costs for administration and document processing (some bills of lading are known to run over a few hundred pages) and lower risks of fraud through use of reliable authentication systems. In turn, consumers can potentially benefit from faster transactions and lower prices of imported goods.

The reliability of the transferable document is paramount. In a public consultation conducted by the IMDA and Attorney-General Chambers, the industry feedback centered around the need to guarantee the singularity or uniqueness of the electronic transferable record such that only one set of obligations is owed by the person who is obliged to perform (hence the concerns about unauthorized duplication). In response, before introducing the amendments to the ETA to enable the use of eBLs, the Singapore authorities had conducted a number of trials for paperless and cross border trade, with both private and public entities. For example, IMDA collaborated with DBS Bank, Trafigura, International Chamber of Commerce, Enterprise Singapore and Perlin to develop an open-source blockchain trade platform (ICC TradeFlow) platform to connect trade partners across borders and conducted a successful pilot trade shipping of goods amounting to US$20 million from South Africa to China. Singapore continues to welcome future partnerships with local and overseas supply chain and tech partners to conduct trials for the effective use of eBLs.

Further Expected Amendments

With the acceleration of authentication and blockchain technology, Singapore continues to look into removing obstacles for creating wills and lasting powers of attorney electronically. The Singapore Ministry of Social and Family Development had already conducted a public consultation in late 2020 on enabling the making of a lasting power of attorney electronically as a deed without wet-ink signatures and without the need to affix physical seals.

Conclusion

As of the date of this publication, only three jurisdictions (including Singapore) have adopted legislation based on or influenced by the MLETR. Nevertheless, Singapore has never shied away from adopting and utilising cutting-edge technology to remain relevant and competitive as an international trade hub. As the COVID-19 pandemic has significantly accelerated the digitalisation of global trade, this is a promising bid toward ensuring that Singapore remains at the forefront of innovation in addressing friction and pain points for businesses conducting cross-border trade.

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Philippines

PHILIPPINE CORPORATE TAX REFORMS

2021 年 3 月 26 日、フィリピン政府の包括的な税制改革プログラムの第 2 弾が、企業のための企業再生および税制優遇措置法として導入された。同法は、2018 年に制定された税制改革法を踏襲し補完するものであり、その目玉は法人税率の遡及的軽減措置である。他方で非上場株式のキャピタルゲイン課税が一律 15%に引き上げられるなど税率が引き上げられたものもあるため留意が必要である。

On 26 March 2021, the second package of the Philippine government's comprehensive tax reform program was signed into law as Republic Act No. 11534 or the Corporate Recovery and Tax Incentives for Enterprises Act (the "**CREATE Law**"). The CREATE Law follows through and complements the initial reforms introduced back in 2018 by Republic Act No. 10963 or the Tax Reform for Acceleration and Inclusion Act ("**TRAIN Law**").

Background

While the TRAIN Law notably established changes to the schedule and/or rates of personal income tax, estate tax, donor's tax, value added tax ("**VAT**') and documentary stamp tax, among others, the CREATE Law focuses on corporate tax reforms, including the reduction of the regular corporate income tax.

Up until the enactment of the CREATE Law, the Philippines has actually been imposing the highest regular corporate income tax rate in the ASEAN region at 30%, as compared to other member states, which only imposed regular corporate tax rates within the range of 17% (Singapore) to 25% (Myanmar).

The timely approval of the CREATE Law provides much needed fiscal reliefs to businesses that are still reeling from the effects of the COVID-19 pandemic. However, it should be noted that some amendments by the CREATE Law increase certain tax rates imposable on transactions entered into by corporations, and gradually eases out preferential tax rates enjoyed by certain entities in an effort to rationalize tax rates and incentives.

Highlights of the CREATE Law

The significant tax reforms introduced by the CREATE Law include the following:

1) Retroactive reduction of regular corporate income tax rate

For domestic and resident foreign corporations

The CREATE Law reduces the regular corporate income tax on the net taxable income of domestic corporations and resident foreign corporations (e.g., branch offices) from 30% to 25% effective 1 July 2020. Further, for domestic MSME corporations (i.e., micro, small and medium enterprises whose total assets do not exceed Php 100 million, exclusive of the land on which its office, plant, and equipment are situated) with net taxable income not exceeding Php 5 million for the taxable year, the regular corporate income tax rate will only be 20% effective 1 July 2020.

For non-resident foreign corporations

Similarly, the regular corporate income tax on the gross taxable income of non-resident foreign corporations (paid as a final withholding) has been reduced from 30% to 25%, but such reduced rate is effective only from 1 January 2021, a later date as compared to the tax cut extended to domestic and resident foreign corporations.

2) Preferential income tax rates enjoyed by OBUs and ROHQs affected

Previously, income of offshore banking units ("**OBUs**") including interest income derived from foreign currency loans granted to residents was subject to a 10% final income tax, while income derived from transactions with non-residents was exempt from tax. This preferential tax treatment of OBUs, however, has been removed by the CREATE Law and in Revenue Regulation No. 5-2021 issued on 8 April 2021, the Bureau of Internal Revenue notes that OBUs will be taxed as resident foreign corporations (at 25%) upon the effectivity of the CREATE Law.

Regional operating headquarters ("**ROHQs**") will be able to continue enjoying the preferential tax rate of 10% on its taxable income only until the end of 2021. Thereafter, ROHQs will be subject to corporate income tax of 25% beginning 1 January 2022. On the other hand, the tax-exempt status of regional area headquarters remains unchanged.

3) Repeal of the IAET

Domestic corporations will benefit from the repeal of the improperly accumulated earnings tax ("**IAET**") for the taxable or fiscal years ending after the effectivity of the CREATE Law.

The 10% IAET was a deterrent for shareholders to avoid tax on dividends, and functioned as a "penalty" to discourage domestic corporations from retaining surplus profits in excess of its paid-up capital and beyond the reasonable needs of the business, when these could have been declared as dividends to shareholders for each taxable year.

4) Tax on transfer of Non-Listed Shares

Taxes payable by resident and non-resident foreign corporations on capital gains from sale or disposition of shares not traded through the stock exchange ("**Non-Listed Shares**") was increased to a final tax of 15% by the CREATE Law (from the previous 5% tax for the first Php 100,000 gain and 10% tax for gains in excess of said amount).

Given that the 15% capital gains tax on sale of Non-Listed Shares was made to apply to domestic corporations (but not foreign corporations) when the TRAIN Law was enacted, such amendment under the CREATE Law merely equalizes the tax treatment of foreign corporations with domestic corporations.

5) Rationalization of tax incentives enjoyed by business enterprises registered with investment promotion agencies

While investment promotion agencies, such as the Board of Investments and Philippine Economic Zone Authority, continue to maintain their functions and powers under the special laws that created them, the administration and grant of tax incentives will be transferred and subject to the oversight of the Fiscal Incentives Review Board.

To qualify for tax incentives, the CREATE Law requires, among others, that a registered business enterprise must be engaged in a project or activity listed in the Strategic Investment Priority Plan (approved by the President and subject to review and amendment every 3 years) and meet target performance metrics after the agreed time period. Subject to meeting such applicable conditions, the following types of tax incentives may be granted to registered projects or activities under the CREATE Law:

a) Income tax related incentives

   i) *For qualified export enterprises* – income tax holiday ("**ITH**") of 4 to7 years (depending on the location and industry), followed either by a special corporate income tax of 5% (based on gross income earned, in lieu of all national and local taxes) for a period of 10 years or enhanced deductions from the taxable income (applying the regular corporate income tax rate) for a period of 10 years, at the option of the export enterprise;

   ii) *For qualified domestic market enterprises* – ITH of 4 to 7 years (depending on the location and industry), followed by enhanced deductions for a period of 5 years;

b) Duty free import of capital equipment, raw materials, spare parts, or accessories directly and exclusively used in the registered project or activity; and

c) VAT exemption on import and VAT zero-rating on local purchases of goods and services directly and exclusively used in the registered project or activity.

Effect on prior investments

For registered business enterprises with tax incentives granted prior to the effectivity of the CREATE Law, the transitory provisions provide that:

- If such project or activity was granted only an ITH prior to the effectivity of the CREATE Law, it shall be allowed to continue availing the ITH for the period specified in the terms and conditions of its registration;

- If such project or activity was granted ITH prior to the effectivity of the CREATE Law and is entitled to 5% tax on gross income after the ITH period, it shall be allowed to avail the 5% tax on gross income for a period of 10 years; and

- If such project or activity is currently availing of 5% tax on gross income granted prior to the effectivity of the CREATE Law, it shall be allowed to continue availing of such incentive for a period of 10 years.

At the end of such periods, the registered project or activity will then be subject to the 25% regular corporate income tax.

Conclusion

The CREATE Law has been described by the Philippines' Secretary of Finance as the "largest fiscal stimulus program for enterprises in the country's history".

With the tax cut on regular corporate income tax being long overdue, its outright and retroactive grant will provide immediate and necessary tax reliefs to affected businesses and boost the country's economic recovery and development in the long term. All things considered, the changes introduced by CREATE Law provide a more fair and balanced tax system that will generally enable the Philippines to remain competitive with its ASEAN neighbors.

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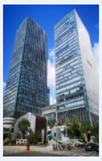

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