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The International Comparative Legal Guide to:

Corporate Tax 2014

10th Edition

A practical cross-border insight into corporate tax work

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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Corporate Tax*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of corporate tax.

It is divided into two main sections:

One general chapter. This chapter discusses what makes the difference between acceptable tax mitigation and unacceptable tax avoidance.

Country question and answer chapters. These provide a broad overview of common issues in corporate tax laws and regulations in 42 jurisdictions.

All chapters are written by leading corporate tax lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor William Watson of Slaughter and May for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in Japan?

As of September 1, 2013, there are 59 income tax treaties including 8 information exchange agreements (applicable to 70 contracting states) currently in force in Japan. In addition, Japan has signed the Convention on Mutual Administration Assistance in Tax Matters on November 3, 2011, and it will come into force on October 1, 2013.

1.2 Do they generally follow the OECD or another model?

Most of the income tax treaties currently in force in Japan generally follow the OECD Model Treaty with certain deviations. After the new modernised tax treaty with the United States entered into force on March 30, 2004 (the "Japan/US Treaty"), the Japanese Government is understood to have been considering the Japan/US Treaty as the new model for Japan's future treaties, particularly for treaties with developed countries. The Japan/US Treaty includes some noteworthy modernised provisions (such as, for example, a fairly comprehensive limitation on benefits clause and an exemption from source country taxation with respect to dividends paid by certain qualified subsidiaries to controlling parents) not found in the OECD Model Treaty. Following the Japan/US Treaty, several other similarly modernised tax treaties with the United Kingdom, France and certain other developed countries entered into force, one after another with certain variations. In some of Japan's income tax treaties with developing countries, Japan agreed to include a tax-sparing credit clause. However, it is anticipated that Japan would generally take the approach of limiting the application of such a clause only to the necessary minimum in terms of the scope of income and the time period.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

If treaties are ratified by the Diet and are promulgated in Japan, such treaties take effect domestically in Japan, in accordance with those treaties, without being incorporated into domestic law. However, it is generally understood that whether or not treaties are self-executing without any domestic execution law depends on the contents of the particular clause in those treaties. In Japan, matters necessary to implement tax treaties are provided for in the Act on Special Provisions of the Income Tax Act, the Corporation Tax Act and the Local Tax Act, in order to implement tax treaties and its related laws and regulations.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

The Japan/US Treaty is the first income tax treaty executed by Japan in which a fairly comprehensive limitation on benefits clause of general application is included, and has been followed, with certain variations, in the most recent modernised tax treaties. Such modernised tax treaties also include a series of anti-conduit clauses, which provide that a resident of a contracting state shall not be considered to be the beneficial owner of dividends, interest, royalties or other income in certain "back-to-back" arrangements so that, if such arrangement exists, contemplated treaty benefits are denied.

The limitation on benefits clause included in the Japan/US Treaty provides that a resident of a contracting state that derives income from the other contracting state shall be entitled to the benefits accorded to residents of the contracting state only if such resident satisfies any one of certain objective tests, which are the "qualified person" test, the "active trade or business" test, and the "competent authority's determination" test. The assumption underlying each of these tests is that a taxpayer that satisfies the requirements of one of the tests is likely to have a real business purpose for the structure which it has adopted; or has a sufficiently strong nexus to the contracting state to warrant obtaining the benefits; and that this business purpose or connection is sufficient to justify the conclusion that obtaining the treaty benefits under the Japan/US Treaty is not the principal purpose of establishing or maintaining residence in the contracting state.

Some of the most recently negotiated treaties or agreements (other than the above-mentioned modernised tax treaties) also include a simple anti-treaty shopping clause (an example of which is Article 26 of the tax agreement between Japan and Hong Kong). As such simple anti-treaty shopping clause is quite general, as compared with the limitation on benefits clause in the modernised tax treaties, it is not yet clear how such clause would be interpreted and enforced in practice.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

It is a well-established constitutional principle in Japan that no treaty is overridden by any rule of domestic law (whether existing at the time the treaty takes effect or enacted subsequently).

1.6 What is the test in domestic law for determining corporate residence?

Under the Japanese domestic tax rules, a corporation is treated as a Japanese corporation (having a corporate residence in Japan) if such corporation has its head office or principal office in Japan. This effectively means that a corporation incorporated under the laws of Japan is treated as a Japanese corporation, whereas a corporation incorporated under the laws of any other jurisdiction is treated as a foreign corporation, as under the private law of Japan, a corporation incorporated under the laws of Japan is required to have, and register, its head office or principal office in Japan.

2 Transaction Taxes

2.1 Are there any documentary taxes in Japan?

Japan has Stamp Tax, which is imposed on certain categories of documents that are exhaustively listed in the Stamp Tax Act, including, for example, real estate sales agreements, land leasehold agreements, loan agreements, transportation agreements, merger agreements and promissory notes.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

We do have Consumption Tax which is value-added tax. Japanese Consumption Tax consists of Consumption Tax (which is a national tax) provided in the Consumption Tax Law and Local Consumption Tax (which is a local tax) provided in the Local Tax Law. The aggregate tax rate of Consumption Tax and Local Consumption Tax is, at present, 5%. A politically controversial amendment to the consumption tax laws was enacted in August 2012 to increase the aggregate rate from 5% to 8% as of April 1, 2014, and further to 10% as of October 1, 2015, subject to certain conditions. It is still uncertain whether the subject conditions will be fulfilled, as of September 1, 2013.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

Taxable transactions, for the purposes of Consumption Tax and Local Consumption Tax, are defined to mean those transactions conducted by a business enterprise (regardless of whether it is a legal person, i.e. a company, or natural person (an individual), and, in the case where such business enterprise is a non-resident company or a non-resident individual, regardless of whether or not such business enterprise has any permanent establishment in Japan) to transfer or lease goods or other assets or to provide services, for consideration, within Japan. However, certain specified categories of transactions, such as, for example, transfers and leases (other than for certain temporary purposes) of land, housing leases (other than for certain temporary purposes), transfers of securities, extension of interest-bearing loans, provision of insurance, deposit-taking and certain other specified categories of financial services, and provision of a certain specified scope of medical, social welfare or educational services, are excluded from taxable transactions. With respect to imported goods, they are subject to Consumption Tax and Local Consumption Tax when they are released from a bonded area, except for certain specified categories of imported goods, such as, for example, securities, stamps, exchange checks, equipment for disabled persons and textbooks, which are excluded from taxable imported goods. Export transactions are generally exempt from Consumption Tax and Local Consumption Tax.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

At present, Consumption Tax and Local Consumption Tax charged on taxable transactions and incurred by a business enterprise is generally recoverable in full, by way of tax credit or refund, with certain exceptions, for example: (i) if a taxpayer's ratio of the revenue from taxable transactions over the total revenue from transactions within Japan is less than 95% (which is typically the case, for example, with certain financial institutions); or (ii) effective from any fiscal year starting on or after April 1, 2012, if a taxpayer's revenue from taxable transactions in the relevant fiscal year exceeds 500 million yen, such taxpayer's recovery of Consumption Tax and Local Consumption Tax would generally be limited.

2.5 Are there any other transaction taxes?

There are some transaction taxes in Japan, including, but not limited to, Registration and Licence Tax, Real Property Acquisition Tax and Automobile Acquisition Tax.

2.6 Are there any other indirect taxes of which we should be aware?

There are various indirect taxes in Japan such as Liquor Tax, Tobacco Tax and Gasoline Tax. Depending on the business involved, these taxes may or may not be relevant.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Under the Japanese domestic tax law, generally a non-resident shareholder (either a non-resident company or a non-resident individual) of a Japanese company is subject to Japanese withholding tax with respect to dividends it receives from such Japanese company at the rate of 20%, provided, however, that if the Japanese company paying the dividends to a non-resident shareholder is a listed company, this withholding tax rate is reduced to: (i) 7% until December 31, 2013; and (ii) 15% thereafter, except for the dividends received by a non-resident individual shareholder holding 3% or more of the total issued shares of such listed Japanese company, provided, however, that this is for the specific purpose of raising Government funds for rehabilitation after the damage caused by the March 11, 2011, disastrous magnitude 9.0 earthquake in Japan. Withholding tax rates are temporarily increased by 2.1 % (for example, if the original withholding tax rate is 15%, the increased rate would be 15.315%), across the board, of the respective original rates for a period of 25 years from January 1, 2013, through to December 31, 2037, due to the imposition of a special (temporary) additional withholding tax (the "Special Income Tax for Rehabilitation") introduced by a special law enacted by the Diet on November 30, 2011.

Most of the income tax treaties currently in force in Japan generally provide that the reduced treaty rate at the source country shall be 15% for portfolio investors and 10% or 5% for parent and other controlling shareholders. Furthermore, under the Japan/US Treaty and a certain limited number of other modernised tax treaties recently executed by Japan, an exemption from source country taxation with respect to dividends paid by a company in either contracting state to a shareholder who is a qualified resident (to be determined subject to the relevant limitation on benefits clause) of the other contracting state, may be available under certain conditions which may vary from treaty to treaty.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Under Japanese domestic tax law, royalties relating to patents, know-how or copyright used for any Japanese company's business carried on in Japan and paid by the Japanese company to a non-resident licensor (either a non-resident company or a non-resident individual) is subject to Japanese withholding tax at the rate of 20%, provided, however, that due to the imposition of the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, the aggregate withholding tax rate for royalties is temporarily increased to 20.42% during the 25-year period from January 1, 2013, through to December 31, 2037. If such non-resident licensor is a non-resident company which has a branch office within Japan, such non-resident company licensor may be exempt from the said withholding tax as long as such non-resident company licensor satisfies certain requirements, including in particular the requirement that such royalties be subject to Corporation Tax in Japan.

Most of the income tax treaties currently in force in Japan provide that the withholding tax rate for royalties generally be reduced to 10%. Furthermore, under the Japan/US Treaty and certain other limited number of modernised tax treaties recently executed by Japan, an exemption from source country taxation with respect to royalties may be available.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Under Japanese domestic tax law, interest on corporate bonds issued by a Japanese company that is paid to a non-resident bondholder (either a non-resident company or a non-resident individual) is generally subject to Japanese withholding tax at the rate of 15%, provided, however, that due to the imposition of the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, the aggregate withholding tax rate for interest on bonds is temporarily increased to 15.315% during the 25-year period from January 1, 2013, through to December 31, 2037. Also under Japanese domestic tax law, with respect to a certain specified scope of discount corporate bonds issued by a Japanese company (except for certain qualified short-term discount bonds), such Japanese company will be required to withhold, at the time of the issuance of the discount corporate bonds, 18% or 16% (the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, is also temporarily imposed during the 25-year period from January 1, 2013, through to December 31, 2037, which brings the aggregate withholding tax to 18.378% and 16.336%, respectively), as the case may be, of the amount equivalent to the difference between the face value and the issue price thereof (original issue discount). The amount so withheld will be deemed to be, and treated as, the Income Tax imposed on, and collected from, the bondholder (including a non-resident bondholder) who receives the original issue discount upon redemption.

There are some important exceptions to the foregoing rule. Firstly, so long as corporate bonds are issued outside Japan on or after April 1, 1998, and interest thereon is payable outside Japan, a non-resident bondholder may be entitled to claim an exemption from Japanese withholding tax on both interest and original issue discount, subject to certain procedural requirements, provided, however, that this exemption does not apply for interest or original issue discount received by a certain specified scope of parties related to the issuer (including parties that have more than a 50% shareholding relationship). Also, with respect to book-entry corporate bonds to which the Act on Transfer of Bonds and Shares, etc. apply, and a book-entry of which is made by a certain depository company, a non-resident bondholder may be entitled to claim an exemption from Japanese withholding tax on both interest on, and original issue discount from, book-entry corporate bonds (except for bonds whose interest is linked to profits of the issuer or its related party) issued in the Japanese market, subject to certain procedural requirements, provided, however, that this exemption does not apply for interest or original issue discount received by a certain specified scope of parties related to the issuer.

The 2013 Tax Reform, which will come into force on January 1, 2016, introduces, among others, a new rule for withholding tax to be applied to discount corporate bonds. Under such new rule, a withholding tax at the time of issuance of discount corporate bonds will be lifted, and a withholding tax at the time of the redemption will be introduced. An issuer company of discount corporate bonds will generally be required to withhold, at the time of the redemption of such discount corporate bonds, 15% (the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, would also be imposed during the 22-year period from January 1, 2016, through to December 31, 2037, which will make the aggregate withholding tax 15.315%), as the case may be, of the amount equivalent to (i) 0.2% of the amount of the redemption (if the term of the bond in question is one year or less), and (ii) 25% of the amount of the redemption (if the term of the bond in question is more than one year).

Interest on bank deposits and other similar deposits deposited by a non-resident depositor (either a non-resident company or a non-resident individual) with any office of a bank or other institution in Japan is generally subject to Japanese withholding tax, under Japanese domestic tax law, at the rate of 15%, provided, however, that due to the imposition of the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, the aggregate withholding tax rate for interest on bank deposits and other similar deposits is temporarily increased to 15.315% during the 25-year period from January 1, 2013, through to December 31, 2037.

Interest on loans extended by a non-resident lender (either a non-resident company or a non-resident individual) to a Japanese company conducting business carried on in Japan and in relation to such business is generally subject to Japanese withholding tax, under the Japanese domestic tax law, at the rate of 20%, provided, however, that due to the imposition of the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, the aggregate withholding tax rate for interest on loans is temporarily increased to 20.42% during the 25-year period from January 1, 2013, through to December 31, 2037. If such non-resident lender is a non-resident company which has a branch office within Japan, such non-resident company lender may be exempt from the said withholding tax as long as the non-resident company lender satisfies certain requirements, including in particular the requirement that interest on such loans is subject to Corporation Tax in Japan.

As an exception to the foregoing, if a non-resident company makes a deposit or extends a loan to any of the financial institutions designated under the Foreign Exchange and Foreign Trade Law of Japan who book such deposit or loan as a special account for offshore banking on or after April 1, 1998, such non-resident company would be exempt from Japanese withholding tax with respect to interest to be paid on such deposit or loan.

Most of the income tax treaties currently in force in Japan provide that the withholding tax rate for interest (regardless of whether it is interest on bonds, deposits or loans) is reduced generally to 10%. It is worth noting that under the modernised tax treaties starting from the Japan/US Treaty, certain specified categories of financial or other qualified institutions (the scope of which may slightly vary from treaty to treaty) which are residents of the contracting states, may be exempt from source country taxation with respect to interest, subject to certain requirements. Japan has recently agreed with the United States to modify the interest clause in the Japan/US Treaty, to exempt interest from source country taxation regardless of whether the recipient of interest falls under certain specified categories of financial or other qualified institutions. This agreement has not come into force yet, pending ratification by both signatories.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

The payor of interest may be denied a deduction of the interest which it paid to a non-resident recipient for its own income tax purposes in Japan, due to the application of the "thin capitalisation" rules under Japanese domestic tax law. Even in such case, the treaty relief (i.e. the application of the reduced treaty rate under the applicable income tax treaty) available to the non-resident recipient of such interest, would nevertheless not be restricted.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

This is not applicable in Japan. Please see question 3.4.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

Under the "thin capitalisation" rules in Japan, debt advanced by a third party and guaranteed by a parent company would generally be treated as related party debt, subject to "thin capitalisation" rules.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Japanese earnings stripping rules were introduced by the 2012 Tax Reform enacted in March, 2012. These rules are applicable starting from the business year beginning on or after April 1, 2013. Under these rules, deduction for net interest payments (as will be determined by these rules) to certain related persons (as more fully defined by these rules) in excess of 50% of an adjusted taxable income (as is determined by these rules) will be disallowed, and the disallowed amounts may be carried forward for seven ensuing business years. If the disallowed interest amount under these rules is smaller than the amount disallowed for deduction under the thin capitalisation rules, then only the thin capitalisation rules will be applied, and vice versa. Interest payments may be subject to transfer pricing rules. Please also see question 3.8 below.

3.8 Is there any withholding tax on real property rental payments made to non-residents?

The following answer relates to real property.

Under Japanese domestic tax law, rental payments from leasing real property or rights to real property located within Japan and paid by a Japanese company to a non-resident (either a non-resident company or a non-resident individual) are subject to Japanese withholding tax at the rate of 20%, provided, however, that due to the imposition of the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, the aggregate withholding tax rate for rental payments is temporarily increased to 20.42% during the 25-year period from January 1, 2013, through to December 31, 2037, except where such lease is made to an individual for the purpose of using real property for his/her own or his/her relatives' residence. If such non-resident lessor is a non-resident company which has a branch office within Japan, such non-resident company lessor may be exempt from the said withholding tax as long as such non-resident company lessor satisfies certain requirements, including in particular the requirement that such payments be subject to Corporation Tax in Japan.

3.9 Does Japan have transfer pricing rules?

Yes. Japanese transfer pricing rules are applicable to both a Japanese company and a Japanese branch of a non-resident company if either of them engage in transactions with any of their "foreign-related persons" (for example, a direct or indirect 50% share ownership would render a foreign person a "foreign-related person" for the purposes of the transfer pricing rules).

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

In Japan, there are at present five different income taxes imposed on corporate profits, namely: Corporation Tax (national tax); Prefectural Inhabitant Tax per corporation tax levy (local tax); Municipal Inhabitant Tax per corporation tax levy (local tax); Enterprise Tax (local tax); and Local Special Corporation Tax (national tax). Depending on the amount of stated capital and certain other factors, the applicable rates for each taxpayer company of these income taxes may vary. While the Enterprise Tax and the Local Special Corporation Tax paid in any fiscal year are treated as a deductible expense in such fiscal year, the other three income taxes are not deductible. The standard Corporation Tax rate was decreased from 30% to 25.5% starting from the business year beginning on or after April 1, 2012, as a result of the special tax reform enacted in December, 2011. However, for a three-year period starting from the business year beginning on or after April 1, 2012, a special (temporary) corporation tax (the "Special Corporation Tax for Rehabilitation") for the specific purpose of raising Government funds for rehabilitation of the damage caused by the March 11, 2011 disastrous magnitude 9.0 earthquake in Japan has been introduced, whose applicable rate is 10% of the original Corporation Tax base. Taking the foregoing into consideration, the headline effective tax rate of all income taxes mentioned above, as per the calculation announced by the Ministry of Finance, for the three-year period starting from the business year beginning on or after April 1, 2012, would be decreased from 40.69% to 38.19% and further decreased thereafter to 35.64% after the Special Corporation Tax for Rehabilitation is lifted. (Please also see the answer to question 5.1 below.) A special law, recently introduced, offers tax incentives for companies newly established in certain designated geographic areas and engaged in certain designated types of businesses, subject to other requirements. For instance, these tax incentives apply to a multinational company's subsidiary newly established as its Asian regional headquarters or R&D centres within certain specific areas in Tokyo. These incentives shall reduce the headline effective tax rate of all income taxes to 28.9%, and further to 26.9% after the Special Corporation Tax for Rehabilitation is lifted. However, reportedly such tax incentives have been rarely used so far.

4.2 When is that tax generally payable?

The taxes on corporate profits are required to be paid, in principle, within two months after the end of each fiscal year. If a company is an ordinary company whose fiscal year is longer than six months, the company is required to prepay part of the current fiscal year's tax within two months after the end of the first six months of each fiscal year.

4.3 Is the tax base accounting profit subject to adjustments, or something else?

The tax base for Corporation Tax is the net taxable income for Corporation Tax purposes; such net taxable income is calculated based on the results reflected in the taxpayer company's financials, prepared in accordance with Japanese generally accepted accounting principles, which are required to be finalised by the proper legal procedure as required under the applicable corporation law, and by making the necessary adjustments to such results as required by any applicable rules provided in the Corporation Tax Act and its related laws and regulations. The tax base for each Prefectural Inhabitant Tax per corporation tax levy and Municipal Inhabitant Tax per corporation tax levy is, in principle, the amount of Corporation Tax.

With respect to Enterprise Tax, generally the tax base is the net taxable income for Enterprise Tax purposes, as determined by the relevant rules for Enterprise Tax (which is not necessarily the same as the net income for Corporation Tax purposes, for example, offshore income is excluded for Enterprise Tax purposes), provided, however, that if a taxpayer company's capital amount is more than 100 million yen, the tax base for Enterprise Tax is determined by a combination of the net taxable income, the amount of value added as determined by the compensation paid to employees, the net interest paid, the net lease rental paid and the net profit or loss in each fiscal year, and the capital of such taxpayer company. As an exception to the foregoing, the tax base for Enterprise Tax of electric, gas and insurance businesses is determined by gross revenue. The tax base for Local Special Corporation Tax is, in principle, the amount of Enterprise Tax.

4.4 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main differences include, but are not limited to, the treatment of donations and entertainment expenses. Donations, including any kind of economic benefit granted for no or unreasonably low consideration, are generally deductible only up to a certain limited amount. Entertainment expenses are generally not deductible, even though such expenses are believed to be necessary for carrying on the business, provided, however, that if the amount of stated capital of a company is 100 million yen or less, entertainment expenses of such company are deductible subject to a certain ceiling.

4.5 Are there any tax grouping rules? Do these allow for relief in Japan for losses of overseas subsidiaries?

It is possible for a group of Japanese companies, where a Japanese parent company directly or indirectly through other Japanese companies owns 100% of other Japanese subsidiaries, to file, at the group's election and subject to an approval of the Commissioner of the National Tax Agency, a consolidated tax return. Once the election to file a consolidated tax return is approved, such election would, in principle, continuously apply to the group making such election.

If a group of companies elects to file a consolidated tax return, the parent company is required to file the consolidated tax return and pay all the consolidated tax. Each subsidiary is jointly responsible for payments of consolidated tax. The consolidated tax is calculated on the basis of the aggregate income of the parent company and all consolidated subsidiaries.

Separate from the above-mentioned consolidated tax return system, the 2010 Tax Reform has introduced special rules for intra-group transactions (the "Group Taxation Rules"), which apply to group companies in a 100% group (companies that have a direct or indirect 100% shareholding relationship), even if they do not elect to file a consolidated tax return. While a consolidated tax return can only be elected by a group of Japanese companies where a Japanese parent company directly or indirectly through other Japanese companies owns 100% of other Japanese subsidiaries, the Group Taxation Rules apply to Japanese companies wholly owned by a foreign or Japanese company or individual. The Group Taxation Rules include the following rules, among others:

(i) recognition of capital gains/losses from transfer of certain assets between Japanese companies in a 100% group is deferred until the said assets are transferred or otherwise disposed of by the transferee company;

(ii) donation between Japanese companies in a 100% group is not deductible for a donor company and donation income is not included in taxable income for a donee company;

(iii) recognition of capital gains/losses from dividends-in-kind between Japanese companies in a 100% group is deferred; and

(iv) capital gains/losses from the transfer of shares by a Japanese company to the issuer of the said shares that is in the same 100% group as the transferor company, are not recognised.

In Japan, the consolidation rules or Group Taxation Rules do not allow for relief for losses of overseas subsidiaries.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Tax is generally imposed at the same rate upon all corporate taxable profits regardless of whether such profits are distributed or retained, with the exception that a certain additional surtax may be imposed on certain types of so-called family companies' retained profits.

4.7 Are companies subject to any other national taxes (excluding those dealt with in "Transaction Taxes") - e.g. tax on the occupation of property?

As far as national taxes are concerned, there are no other major taxes currently in force which may have a material impact on the business operations of a company in Japan.

4.8 Are there any local taxes not dealt with in answers to other questions?

Among local taxes, other than those already mentioned above, Prefectural Inhabitant Tax per capita levy, Municipal Inhabitant Tax per capita levy, Fixed Assets Tax and Automobile Tax may be of general application to the business operations in general of a company in Japan.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

For purposes of income taxes imposed on a company in Japan, generally all of the taxable income of a company is aggregated, regardless of whether such income is classified as capital gains or ordinary/business profits. Exceptions to the foregoing include a surtax which may be imposed on certain capital gains derived by disposition of real properties, provided, however, that such surtax is currently suspended until December 31, 2013. In the case where a tax-free qualified corporate reorganisation such as a qualified merger is undertaken, recognition of capital gains can be deferred. Also, there may be a deferral of recognition of capital gains/losses from transfer of certain assets between Japanese companies in a 100% group, as mentioned in question 4.5 above.

5.2 If so, is the rate of tax imposed upon capital gains different from the rate imposed upon business profits?

The surtax (as referred to in question 5.1 above) to be imposed on capital gains derived by the disposition of real property including, but not limited, to land located within Japan, is 5%. If certain real property such as land in Japan is disposed of within five years from its acquisition, the rate of surtax is increased to 10%. The application of these surtaxes is suspended until December 31, 2013.

5.3 Is there a participation exemption for capital gains?

There is no participation exemption for taxation on capital gains. However, with respect to dividends paid to a Japanese company by its foreign subsidiary during any fiscal years starting on or after April 1, 2009, a participation exemption from Japanese income taxation is granted for the 95% portion of such dividends if the Japanese company owns at least 25% of such foreign subsidiary's issued shares or voting shares for at least six months. With the introduction of such participation exemption for dividends, the indirect foreign tax credit system (which was previously applied up to the second tier indirect subsidiaries) was abolished. The 25% threshold requirement mentioned above may be altered if a particular taxpayer is eligible for treaty benefits under an applicable tax treaty in which a lower threshold is required for a treaty-based foreign tax credit eligibility (for example, a 10% shareholding threshold is provided under the Japan/US Treaty).

Also, with the introduction of the above-mentioned participation exemption rule for dividends, the Japanese anti-tax haven rules, or controlled foreign corporations (CFC) rules, were amended to the effect that, among others, retained earnings of a Japanese company's CFC subsidiaries shall be deemed to be included in the Japanese company's taxable income subject to Japanese corporate income taxation, regardless of whether or not such retained earnings are distributed as dividends, and certain other adjustment amendments are made.

5.4 Is there any special relief for reinvestment?

Dividends received by a Japanese company from another Japanese company may be either 100% or 50% (subject to certain adjustments) deducted from the recipient company's taxable income, depending on whether or not the recipient Japanese company owns 25% or more of the total issued shares of the dividend-paying Japanese company. Such dividend-received deduction is also available to a Japanese branch of a foreign corporation with respect to dividends received by such branch from any Japanese company. Capital gains from the disposition of certain qualified business assets (such as certain qualified land and buildings) may be entitled to certain roll-over relief (in whole or in part) if certain qualified reinvestment is made within a prescribed period. Also, recognition of capital gains/losses from the transfer of certain assets and dividend-in-kind between 100% group companies is deferred. Please also see question 4.5.

5.5 Does Japan impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

If real property (land or any such right on land or any such building or auxiliary facility or structure) which is located within Japan, is alienated by a non-resident (either a non-resident individual or a non-resident company), the gross amount of the consideration received by such non-resident from such alienation is subject to Japanese withholding tax if it is paid, or deemed paid, within Japan, except where such alienation is made to an individual for the purpose of using such real property for his/her own or his/her relatives' residence. The applicable withholding tax rate is 10%, provided, however, that due to the imposition of the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, the aggregate withholding tax rate for proceeds from alienation of real property is temporarily increased to 10.21% during the 25-year period from January 1, 2013, through to December 31, 2037.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

If a non-resident company forms a subsidiary in Japan (i.e. establishing a company incorporated under the laws of Japan) by making a capital contribution in cash, the formation of the subsidiary is not a taxable event. If a non-resident company forms a subsidiary by making a contribution-in-kind, such contribution-in-kind is treated as a disposition by such non-resident company of the contributed assets. Although such disposition is generally a taxable event, if the contributed assets are real properties situated within Japan, or certain other similar assets or assets other than those held through such non-resident company's offices outside of Japan, such contribution-in-kind may qualify for a tax-free reorganisation under Japanese tax law, if certain other requirements are satisfied. If the contributed assets fall under the category of the assets situated within Japan and the subject contribution-in-kind does not qualify for a tax-free reorganisation, it is possible that the capital gains derived from such disposition are found to constitute income sourced and taxable in Japan for the non-resident company making such contribution-in-kind, in which case such non-resident company would generally be, in the absence of a relief under an applicable tax treaty, subject to Japanese corporate income taxes with respect to such capital gains.

In order to form a Japanese subsidiary, the articles of incorporation of such subsidiary must be prepared, which is subject to Stamp Tax at the rate of 40,000 yen. Further, such subsidiary must be registered in the commercial register kept at the competent office of the legal affairs bureau of the Ministry of Justice. Upon filing an application for such registration, such subsidiary is generally subject to Registration and Licence Tax at the rate of seven-thousandths (7/1,000) of its stated capital amount. Any subsequent increase in the stated capital of such subsidiary is also required to be registered in a timely manner in the commercial register, and is generally subject to Registration and Licence Tax at the same rate of the increased stated capital amount. (While a branch of a non-resident company, including any change in the stated capital of such non-resident company in its home country, is also required to be registered in the commercial register in Japan, the rate of Registration and Licence Tax imposed on the branch upon application for such registration is fixed at 90,000 yen per application for establishment of a branch, and 9,000 yen per application for change in the stated capital in its home country.)

6.2 Are there any other significant taxes or fees that would be incurred by a locally formed subsidiary but not by a branch of a non-resident company?

Generally, there are no other significant taxes or fees that would be incurred by a Japanese subsidiary upon its formation, but not by a branch of a non-resident company.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

Under the Corporation Tax Act, if a non-resident company which has its branch in Japan earns "profits derived from business carried on within Japan", such business profits constitute Japanese source income taxable in Japan. With respect to the question of how the amount of such business profits should be determined, certain specific rules are provided in the relevant regulations. Under such regulations, depending on the category of business involved (e.g. whether the business involved is manufacturing, sale and distribution, construction, shipping or air transportation, insurance, publication and broadcasting, or any other business), different factors are used to determine the scope of income to be treated as business profits sourced from Japan.

In the case where the subject non-resident company is a resident of a country with which Japan has an income tax treaty, generally such treaty includes a provision similar to Article 7(2) of the OECD Model Treaty (requiring that the arm's-length principle shall be applied in determining the amount of income attributable to the relevant permanent establishment). The question of to what extent the above-mentioned specific rules included in the Japanese domestic tax law should be interpreted as being altered by such treaty provision, often gives rise to a serious issue in practice.

With respect to the detailed method of calculating taxable income, the rules applicable to a Japanese company are, in principle, also made applicable to a branch of a non-resident company, *mutatis mutandis*. In calculating the taxable income of a branch, only such expenses as are necessary for earning Japanese source income, are treated as deductible expenses.

6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)?

There is no branch profits tax or other similar tax to which a branch of a non-resident company, but not a subsidiary, is subject.

6.5 Would a branch benefit from double tax relief in its jurisdiction?

A branch of a company which is a resident in such treaty country can benefit from the treaty provisions to some extent. For example, while the so-called entire system is adopted for income taxation of a non-resident company which has a branch in Japan under Japanese domestic tax law, under almost all of the income tax treaties currently in force in Japan, the attributable system is adopted. With respect to the treaty relief given to passive income such as dividends, interest and royalties, because most of the income tax treaties currently in force in Japan include provisions similar to Articles 10(4), 11(4) and 12(3) of the OECD Model Treaty, a branch of a non-resident company would not be allowed to enjoy such treaty relief.

6.6 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

No. No Japanese withholding tax or other tax would be imposed on the remittance of funds from the Japanese branch of a foreign corporation to its head office merely because such remittance is a repatriation of profits by the branch to its head office abroad.

7 Overseas Profits

7.1 Does Japan tax profits earned in overseas branches?

Yes. A Japanese company is generally subject to Japanese income taxes with respect to its worldwide income. In other words, if a Japanese company has overseas branch(es) and earns tax profits through such overseas branch(es), such tax profits are included in the Japanese company's overall taxable income for Japanese taxation purposes.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

As already mentioned in question 5.3, subject to certain shareholding threshold and holding period requirements, the 95% portion of the dividends paid to a Japanese company by its overseas subsidiary is exempt from Japanese corporation tax.

7.3 Does Japan have "controlled foreign company" rules and, if so, when do these apply?

As already indicated in question 5.3, Japan has its own CFC rules and if such CFC rules are applied to any particular overseas subsidiary, such CFC subsidiary's net profits (but not its net losses) for any relevant fiscal year shall be deemed to constitute the Japanese parent company's income in its fiscal year ending immediately after two months have elapsed from the end of the subsidiary's relevant fiscal year, regardless of whether or not such profits are distributed to the parent.

8 Taxation of Real Estate

8.1 Are non-residents taxed on the disposal of real estate in Japan?

If real property (land or any such right on land or any such building or auxiliary facility or structure) which is located within Japan is alienated by a non-resident (either a non-resident individual or a non-resident company), the gross amount of the consideration received by such non-resident from such alienation is subject to Japanese withholding tax if it is paid, or deemed paid, within Japan, except where such alienation is made to an individual for the purpose of using such real property for his/her own or his/her relatives' residence. The applicable withholding tax rate is 10%; provided, however, that due to the imposition of the Special Income Tax for Rehabilitation as mentioned in question 3.1 above, the aggregate withholding tax rate for proceeds from the alienation of real property is temporarily increased to 10.21% during the 25-year period from January 1, 2013, through to December 31, 2037. If such non-resident alienator is a non-resident company that has a branch office within Japan, such non-resident company alienator may be exempt from the aforementioned withholding tax, as long as such non-resident company alienator satisfies certain requirements, including, in particular, the requirement that such consideration received for the real property be subject to Corporation Tax in Japan.

Regardless of the imposition of the aforementioned withholding tax, if a non-resident alienates real property located within Japan, such non-resident alienator is required to file a tax return in Japan and is subject to Japanese income tax or corporation tax, as the case may be, with respect to any capital gains derived from such alienation. In the case where such non-resident alienator is subject to the aforementioned withholding tax, the amount of such withholding tax may be deducted from such income tax or corporation tax, subject to certain procedural requirements.

8.2 Does Japan impose tax on the transfer of an indirect interest in real estate located in Japan and, if so, what constitutes an indirect interest?

When a non-resident individual or a non-resident company and his/her/its specially related parties, in aggregate, hold (i) more than 5% of shares issued by a company with 50% or more of its asset value attributed directly or indirectly to real property (land or any such right on land or any such building or auxiliary facility or structure) which is located within Japan (Real Property Related Company) and where shares are either listed on a stock exchange or traded over-the-counter, or (ii) more than 2% of shares issued by a Real Property Related Company not so listed, as of the Determination Date (see below), if the non-resident individual or the non-resident company transfers the Real Property Related Company shares, the non-resident company or the non-resident individual is required to file a tax return in Japan and is subject to Japanese income tax or corporation tax, as the case may be, with respect to any capital gains derived from such transfer.

The Determination Date is (i) in the case of a non-resident individual, December 31 of the year immediately preceding the year in which his or her transfer of the relevant Real Property Related Company shares takes place, and (ii) in the case of a non-resident company, the day immediately prior to the beginning of the fiscal year in which the transfer of the relevant Real Property Related Company shares takes place.

8.3 Does Japan have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

No. REITs structured in Japan (J-REITs) are generally structured in the form of a company, although it is legally possible to structure J-REITs in the form of a trust under Japanese law. Thus, dividends from J-REITs are, practically, subject to the same taxation as dividends paid by a local resident company to a non-resident (please see question 3.1 above), and transfers of investment equity to J-REITs are subject to the same taxation as transfers of Real Property Related Company shares (please see the question 8.2), in general.

9 Anti-avoidance

9.1 Does Japan have a general anti-avoidance or anti-abuse rule?

Japanese tax laws do not have a general anti-avoidance rule. However, Japanese tax laws include a specific anti-avoidance rule for a family company (i.e., a company where more than 50% of its shares are held by three or less shareholders and their related persons (as more fully defined in the law)). The rule grants the tax authority a right to impose corporation tax on a family corporation that has conducted an act or account of tax avoidance that results in an unjust decrease in the burden of the corporation tax for such family company by recharacterising the legal form of such act or account. Japanese tax laws also have specific anti-avoidance rules that involve corporate reorganisation transactions or transactions-consolidated tax return filing. These rules give the tax authority rights similar to those in the aforementioned specific anti-avoidance rule for a family company.

It is worth noting that recently the tax authority has tended to take a more active stance in combating avoidance schemes, and taxpayers so challenged have been more inclined to seek judgments by the courts. Thus, the courts are playing a more important role than ever in rule-making in light of tax avoidance.

9.2 Is there a requirement to make special disclosure of avoidance schemes?

Japanese tax laws do not have a disclosure rule that imposes a requirement to disclose avoidance schemes.

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