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Singapore Institute of
ACCREDITED
TAX PROFESSIONALS

Technical Group Discussion

Group Relief – Where To From Here?

31 August 2012, Friday

Group Relief systems and tax consolidation regimes have always been an integral consideration when companies under the same group lodge their tax returns. To address queries and grey areas on these issues, SIATP organised a technical discussion on "Group Relief- Where To From Here?"

Accredited Tax Advisor (Income Tax) Mr David Sandison shared his valuable insights on various group relief systems and tax consolidation regimes put in place currently.

In an engaging seminar Mr David Sandison, Accredited Tax Advisor (Income Tax) and Tax Partner of PricewaterhouseCoopers Services LLP, gave an overview on the key features of the group relief systems and tax consolidation regimes in various countries, such as Singapore, the United Kingdom (UK), the United States (US) and Australia. Possible grouping arbitrages arising from the claim rules in these countries were also explained and the session ended with a summary of observations that tax professionals, and possibly the tax authority, can mull over moving forward.

Key Features of the Singapore Group Relief System

The group relief system was introduced from the Year of Assessment (YA) 2003 under Section 37C of the Income Tax Act. It generally enables the transfer of the current year's unutilised capital allowances, trade losses and donations (collectively referred to as 'loss items' hereinafter) between members of the same group, provided that the transferor and claimant meet the following criteria:

1) Singapore incorporated companies;
2) Belong to the same group of companies and maintain 75% shareholding threshold on the last day of the basis period for a YA; and
3) Have the same accounting year end.

Expanding on the first criterion, two Singapore incorporated companies are members of the same group if:

a) One beneficially holds 75% of the issued ordinary shares in the other; or
b) A third Singapore incorporated company holds at least 75% of the issued ordinary shares in both.

The holders of the ordinary shares must also demonstrate that they are beneficially entitled, directly or indirectly, to at least 75% of the residual profits and assets upon winding up.

The whole of the qualifying deduction must be transferred if capacity exists. Pro-rating applies when a Singapore company becomes a member of the group partway through a basis period. The quantum of loss items that can be transferred is the lower of pro-rated assessable income of the claimant or pro-rated quantum of loss items.

The transferor and claimant companies have to make an irrevocable election to claim group relief when lodging their tax returns.

Key Features of UK Group Relief System

The group relief systems in the UK and Singapore parallel each other in some ways. Both include the requirements of a minimum 75% ordinary shareholding level as well as the beneficial ownership of residual profits and residual assets on a notional winding-up.

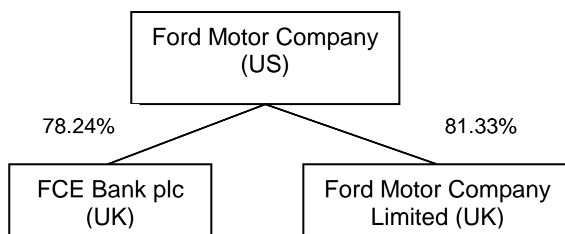
Prior to 2000, members of the same group must be UK tax residents to satisfy the 75% shareholding test. However, as a result of the application of the European Court of Justice's decision in *Imperial Chemical Industries plc v Colmner*, this condition was changed. Consequently, group relief is available even if the common parent is not a UK-resident company.

Unlike the Singapore group relief system, UK group relief can be granted on a time-apportioned basis if the companies do not have the same accounting periods. Companies also have the flexibility to transfer as much or as little as they desire.

Applicability of Her Majesty's Revenue and Customs (HMRC) v FCE Bank in Singapore?

HMRC v FCE Bank plc [2011] UKUT 420 (TCC) is a UK case on group relief involving the non-discrimination article (Article 24(5)) found in the 1975 UK-US tax treaty, which is the same as the corresponding provision in the OECD Model Convention, as shown below:

"Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected."



In the diagram on the left, FCE Bank plc (FCE) and Ford Motor Company Limited (FMCL) were both UK residents since establishment and were directly owned by Ford Motor Company (FMC) in the United States (US).

The two UK resident subsidiaries purported to transfer losses (prior to the change of law in 2000), even though they were not directly held by another UK tax resident company.

Group relief was initially denied by HMRC. However, the UK Upper Tribunal subsequently decided that there was discrimination within the meaning of the non-discrimination article of the UK-US tax treaty. Consequently, the two UK subsidiaries were entitled to group relief even though at the relevant time (i.e. 1994), both were held by FMC, a US-resident company. In summary, the non-discrimination article would apply if the element of ownership is the only difference between the actual situation and the hypothetical domestic comparable.

It was opined that the non-discrimination article will not apply in Singapore's context as Singapore's group relief criteria are not entirely similar with UK's criteria. Nevertheless, the above serves as a good exercise to exhibit the tax consequences arising from different claim rules.

Key Features of US Tax Consolidation Regime

Tax consolidation basically views a group of wholly-owned or majority-owned companies as a single entity for tax purposes. In short, this implies that the parent company of the group is responsible for most, or even all, of the group's tax obligations and therefore, a loss transfer mechanism is not specifically required. Thus, tax is basically calculated based on the group's consolidated taxable income.

Broadly, the US tax consolidation regime is only applicable to subsidiaries where 80% of the total voting power and value of all classes of shares (excluding non-voting preferred shares) are held by the parent company.

In general, US' check-the-box regulations allow business entities to effectively determine if they wish to be treated as either flow-through entities, such as a partnership, or corporation. Where business entities elect to be treated as flow-through entities, all income/losses will flow through to their owners where US tax is computed. On the other hand, if the business entities elect to be treated as corporations, they will have to pay taxes on the income earned.

No election is required for business entities that would like to be taxed as partnerships. Business entities that wish to be treated as corporations must elect to be as such by submitting Form 8832 to the Internal Revenue Service.

Key Features of Australian Tax Consolidation Regime

The primary concept of the Australian tax consolidation regime is the "single entity" principle, which allows wholly-owned entities to be treated as one single taxpayer. The head company will complete a single tax return, and all transactions within a tax consolidated group will be ignored for tax purposes.

However, non-income tax regimes, such as GST and withholding tax obligations, fall outside the consolidation regime and remain the responsibility of each group member.

The head company is responsible for the payment of income tax-related liabilities on behalf of the group. In the event that the head company fails to fully discharge its obligation to pay the group's tax liability by the due date, subsidiary members that are part of the group will be jointly and severally liable for the group liability.

Members can avoid this liability by entering into a "tax funding agreement" or "tax sharing agreement" to apportion the liability among members before it is due for payment by the head company. When a subsidiary member departs from the group, it must first pay its estimated contribution amount as determined by the tax funding/ tax sharing agreement to the head company.

At a Glance

The table below gives a summary comparing the differences in the group relief systems and tax consolidation regimes of the said countries:

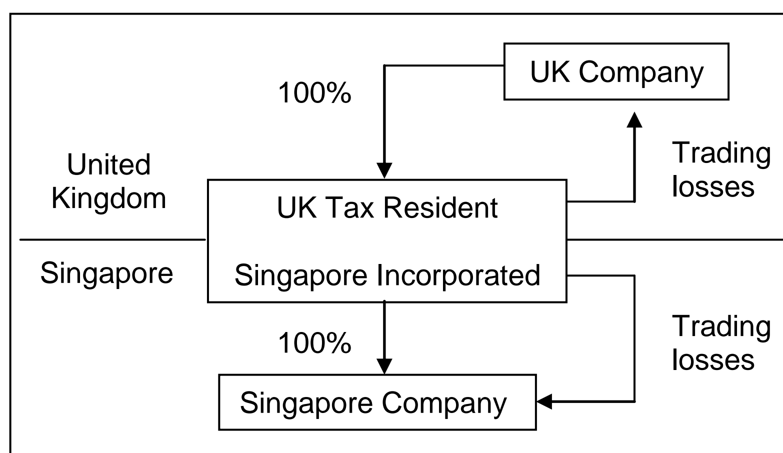
	Singapore	UK	US	Australia
Loss transfers?	Yes	Yes	Yes	No, losses incurred by head company
CGT rollover?	Not applicable	Yes	No	No, transfers ignored
BC / BA rollover?	Yes, s.24	Yes[1]	No	No, transfers ignored
Transfer of prior year losses?	No	No	Can be transferred upon consolidation	Can be transferred upon formation or joining
Common ownership required?	75%	75%	80%	100%
Single tax return?	No	No	Yes	Yes
Amount of transfer	100%	100%	N/A	N/A
Domestic / international consolidation	Domestic	International	Effectively international	Domestic

[1] Subject to a 'degrouping' charge if transferee leaves group within six years.

Grouping Arbitrages

With reference to the abovementioned countries, Mr Sandison illustrated the two possible grouping arbitrages arising from the differences in group relief/ tax consolidation rules.

UK/ Singapore Double Dip



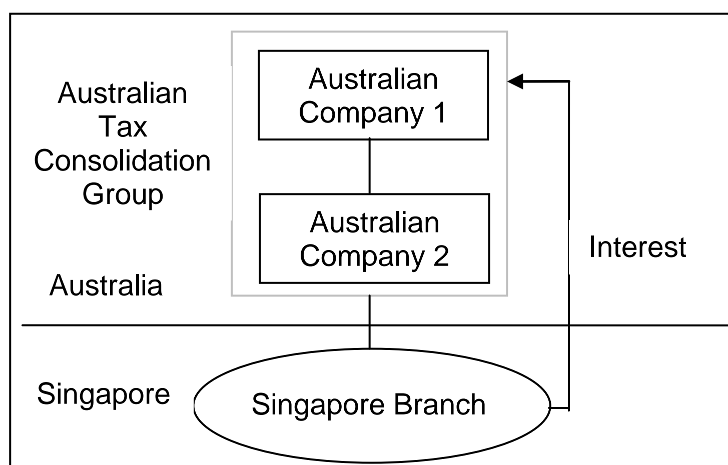
The diagram on the left shows a company will be regarded as a UK tax resident if the control and management of its business are exercised in UK.

If the UK tax resident-cum-Singapore incorporated company has made substantial trade losses from its operations in Singapore, both the Singapore and UK group companies are able to claim the trade losses incurred by the former company based on the existing respective domestic group relief rules.

Australia/ Singapore Branch Financing

In the diagram on the right, when a Singapore Branch makes an interest payment to the Australian Company 1, withholding tax of 10% is applicable.

The interest income received by the Australian company will in turn be subject to tax at the Australian corporate tax rate of 30%, with a credit for the Singapore tax suffered.



However, if the Australian companies had elected to be assessed as a "single entity" under the tax consolidation regime, the interest will not be taxable in Australia as it constitutes a repatriation of exempt branch profits.

Participants were cautioned that the above are only preliminary studies and more research and analysis should be conducted before implementing any of the above structures.

Observations

The session ended with an overview of observations on this topic.

The introduction of the Singapore group relief system was a welcome move for taxpayers. However, as 10 years have passed since its implementation, it may be time for the conditions to be reviewed.

One suggestion is to grant more flexibility to the taxpayers by adapting the following features from the UK group relief system:

1) Remove the criterion that the transferor and claimant must be Singapore incorporated companies. This will allow taxpayers to trace common ownership to an ultimate offshore holding company. Group relief may also possibly be extended to Singapore branches of foreign companies.

2) Companies can choose to transfer as much or as little loss items as desired.

3) Companies need not have the same accounting year-end. Where companies do not have the same accounting periods, group relief can be allowed on a time-apportioned basis.

A big thank you to Mr Sandison for the interesting presentation and insightful discussion!

END.

About SIATP's Technical Discussions

SIATP's technical discussions have continually been very well received by accredited tax professionals. Unlike the run-of-mill Continuing Professional Educational courses which typically cover tax fundamentals, SIATP's interactive technical discussions are designed to cover tax issues that do not have clear-cut solutions or situations that may have different interpretations. Over time, these discussions contribute in boosting the overall tax standards in Singapore.

About Mr David Sandison

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David spent his formative years with PwC London, and advanced his career with the firm in Melbourne, Australia before migrating to Singapore in 1991. With 28 years of tax experience, 21 of which have been in the Singapore and Southeast Asian tax and business environment, David has spent most of his time dealing with international advisory work across a whole spectrum of industries.

As a partner in PwC's Financial Services section of Tax, David is regularly involved in helping clients structure their venture capital, private equity and real estate fund projects, and works closely with the firm's Mergers and Acquisitions, and Banking and Capital Markets teams in this regard. In addition, David also leads the Tax training and technical departments of PwC.

This technical event commentary is written by SIATP's Tax Manager, Ms Lee Shin Huay. An Accredited Tax Practitioner (Income Tax), Shin Huay has over six years of experience in corporate and individual tax. Previously from Deloitte & Touche LLP, she now leads various initiatives of Singapore's first dedicated professional body for tax specialists to enhance Singapore's position as a centre of tax excellence.