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AUSTRALIA

FOREIGN INVESTMENT REGULATION IN AUSTRALIA

Foreign investment in Australia is governed by a complex combination of law and policy. Inbound investments by foreign persons in Australian businesses and assets over stipulated thresholds will be reviewed on a case-by-case basis to determine whether the transaction is contrary to the national interest. Foreign investment in most land assets and by foreign government investors will be subject to notification and review, irrespective of the value of the investment.

Australia's foreign investment regime is currently undergoing significant reforms, which are expected to be in force by 1 December 2015. This briefing explains the key elements of the current regime and outlines developments, issues and changes which are expected to come into force by year's end.

For details, please find the link to
http://www.cliffordchance.com/briefings/2015/10/foreign_investmentregulationinaustralia.html

Source: Clifford Chance Client Briefing, October 2015

CHINA

VAT REFORM AND IMPLICATIONS FOR MULTINATIONAL COMPANIES

China is in the process of introducing an 11% VAT for the real estate and construction sector, to replace the current 5% and 3% Business Tax respectively. The Chinese government is proposing to apply VAT from either Q2 or Q3 of 2016. The Chinese VAT is proposed to apply to all sales and leasing of real estate, and to all forms of real estate – whether residential, retail, office, industrial, or commercial property. VAT is likely to have a significant impact in the real estate industry as China is unlikely to give a refund to the extent that input VAT exceeds output VAT. This may mean that VAT on acquisition or construction costs will need to be carried forward over many years before it is fully recovered, having a significant impact on IRRs.

While the introduction of VAT may still be several months away, there are a number of issues which impact on existing projects including:

- Funds would be entering into contracts or commitments now which span the introduction of VAT. If those contracts are not adapted to cater for the VAT, then the funds could potentially be worse off by 11% and bear the VAT as a real cost. By contrast, many of those issues can be dealt with now from a contracting perspective;

- From a financial modeling perspective, there would no doubt be sales or leasing of projects which span 2016 and therefore those financial models need to be updated for VAT purposes.

For details, please find the link to
https://home.kpmg.com/xx/en/home/insights/2015/09/tnf-china-vat-reform-and-implications-for-multinational-companies.html

Source: KPMG, September 2015

SAT SOLICITS PUBLIC COMMENTS ON NEW CHINA TRANSFER PRICING AND SPECIAL TAX ADJUSTMENTS DISCUSSION DRAFT

On 17 September 2015 the State Administration of Taxation (SAT) released the long-awaited public discussion draft of its guidance concerning the implementation of 'Special Tax Adjustments' for public consultation. The finalization of the Discussion Draft, anticipated by the end of 2015, would replace the existing SAT guidance on Special Tax Adjustments in Circular 2 [2009], which provides guidance on the Chinese Transfer Pricing (TP) rules and the key Chinese tax law anti-avoidance rules. This document focuses on the changes that will be, in practice, of most significant impact for multinational enterprises.

For details, please find the link to
http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Pages/China-tax-alert-1509-25-SAT-solicits-public-comments-on-new-China-transfer-pricing.aspx

Source: KPMG, September 2015

PBOC PROMULGATES NEW POLICIES ON MNC CROSS-BORDER RMB CASH POOLING

The People's Bank of China (PBOC) has amended its cross-border RMB cash pooling policies for multi-national corporations (MNCs) in China, issued in 2014, and promulgated the 'Notice on Further Facilitating Cross-border RMB Cash Pooling Business by Multi-national Corporations', in order to encourage the global use of RMB and to facilitate the progress of RMB internationalisation. The PBOC Notice introduces several relaxations and improvements to encourage MNC cross-border RMB cash pooling, including the following:

- the three year establishment record requirement for an MNC member company that participates in the cash pooling (participating members) is reduced to one year;

- the aggregated operating revenues of the onshore participating members should be no less than RMB1 billion (whereas RMB5 billion was required before) and the offshore participating members should be no less than RMB200 million (whereas RMB1 billion was required before);

- the prohibition on domestic local government financial vehicles and real estate companies from participating in cash pooling has been removed;

- funds collected into the cross-border RMB cash pool are no longer limited to proceeds from production, business operation or industrial investment activities;

- the macro prudent policy parameter is increased from 0.1 to 0.5 to expand the quota of the funds that can be remitted from offshore to the cross-border RMB cash pool;

- the offshore parent company of the MNC can appoint either an onshore or offshore participating member as the leading enterprise of the cash pooling and the leading enterprise is allowed to appoint up to three eligible banks as settlement banks; and

- the appointed settlement bank is allowed to provide daylight and overnight overdraft services.

For details, please find the link to
http://www.pbc.gov.cn/zhengwugongkai/127924/128038/128109/2955281/2015092314201657344.pdf

Source: Clifford Chance Alert, September 2015

CHINA EASES RULES ON FOREIGN INVESTMENT IN REAL ESTATE

To boost its real estate market in the current economic slowdown, the Chinese government recently issued the Notice Adjusting Policies on the Access and Administration of Foreign Investment in the Real Property Market which came into effect on 19 August 2015 (Notice 122). This Notice 122 relaxes a number of restrictions on foreign investment in the real estate sector which were first introduced in 2006.

- Under PRC law, any foreign-invested enterprise (FIE) is subject to a mandatory ratio between its registered capital amount and the amount of total investment. Such ratio determines an FIE's capability of borrowing foreign loans. For an ordinary FIE, the ratio varies between 1/3 to 70 percent depending on the total amount of investment. In 2006, as a measure to curb the then overheated real estate market, Chinese government promulgated Circular 171 which imposed a much higher ratio on foreign-invested real estate enterprises (Real Estate FIE) – its equity must be at least 50 percent of its total investment if the latter exceeds USD10 million. Now, such restriction is removed by Notice 122. Real Estate FIEs may enjoy the same equity to-debt ratio as other FIEs and will have a lower level of equity and a higher level of leverage.

- According to Circular 171, a Real Estate FIE must satisfy the following requirements before it may borrow domestic loans or foreign loans or convert foreign exchange loans into Renminbi: (1) its registered capital has been fully paid; (2) it has obtained the land use right certificate; and (3) funds injected in the real estate project has reached 35 percent of the project's total investment amount. Now, Notice 122 provides more flexibility by removing the first requirement on full payment of registered capital, i.e., as long as conditions (2) and (3) are satisfied, the Real Estate FIE is eligible to obtain loans.

  Nevertheless, Notice 122 fails to address a major practical hurdle that Real Estate FIEs face when seeking foreign loans. According to relevant regulations issued by the State Administration of Foreign Exchange (SAFE), any Real Estate FIE approved and registered with the Ministry of Commerce on, or after, 1 June 2007 is not permitted to register its foreign debts with SAFE. Such restriction is not changed by Notice 122. Therefore, unless SAFE makes further clarifications on this point, the benefits and flexibility brought by Notice 122 will be limited for Real Estate FIE obtaining financing.

- Notice 122 also makes it easier for foreign individuals intending to purchase real estate in China for their own use. Previously under Circular 171, only foreign individuals who have been studying or working in China for more than one year are allowed to purchase real estate – such one-year limit is now lifted by Notice 122. It is worth noting that purchase of real estate must still be for the foreign individuals' own use and be subject to relevant restrictive policies on real estate purchase as implemented by the municipal government of the city where such property is located.

- As a continuing policy to simplify foreign exchange registration formalities, Notice 122 provides that for foreign exchange registration of direct investment matters, Real Estate FIEs no longer need to register with SAFE; instead, they may complete such formalities with the relevant handling bank. Such change is in line with earlier reforms launched by SAFE which applies to all FIEs.

- Since 2006, the Chinese government has tightened its policies on foreign investment in the overheated real estate market. However, with the country's economy slowing down in recent years and the depreciation of the Renminbi, the issuance of Notice 122 seems to signal a change in government policymaking in this sector. The relaxations brought by Notice 122 will no doubt facilitate foreign investors investing in the Chinese real estate market. However, whether Real Estate FIE can substantially benefit from the new policies, especially in relation to its capability to obtain foreign loans, further clarifications or implementing rules will need to be issued by the government.

For details, please find the link to
https://m.mayerbrown.com/china-eases-rules-on-foreign-investment-in-the-real-estate-market-09-02-2015/ , contact details: Pieter de Ridder (pieter.deridder@mayerbrownjsm.com) and David Ellis (david.ellis@mayerbrownjsm.com)

Source: Mayer Brown JSM, October 2015

KOREA

KOREAN GOVERNMENT ANNOUNCES MEASURES TO EASE REGULATION IN ECONOMIC ZONES TO ATTRACT FOREIGN INVESTMENT

The Korean Government has announced measures to ease regulations for companies that invest in economic zones, which are intended to boost foreign investment. Investors who build factories in free economic zones (FEZs) will no longer have to go through environmental impact assessments twice if they meet the requirements the first time. Companies that operate in free trade zones (FTZs), a slightly different type of factory site, will now have simplified procedures for transactions and trade reports. The number of permitted non-Korean workers will also be increased.

The government has indicated that it also intends to create a more business-friendly environment for foreign investors. It will provide exemptions from confirmation by the heads of the customs service for companies that fully abide by the laws related to import and export permissions. Paper documents for export and import declarations will be replaced with electronic forms. Finally, in order to boost trade with China and Japan, Korea will build more ports and docking facilities for ferries that can carry trucks. A joint logistics center will be built near Incheon International Airport. In cooperation with the Chinese customs service, Korea will further allow all companies to use a simplified, electronic customs clearance system, as opposed to the current policy of only allowing select firms to do so.

In a separate press release, the government has stated that it intends to improve logistics, customs service and e-commerce for businesses to fully utilise Korea’s Free Trade Agreement (FTA) networks as an export platform to enter Asian markets.

For details, please find the link to
http://www.cliffordchance.com/briefings/2015/09/international_regulatoryupdate2428augus.html

Source: Clifford Chance International Regulatory Update, August 2015

SINGAPORE

MAS CONSULTATION: PROPOSED AMENDMENTS TO SECURITIES AND FUTURES ACT, FINANCIAL ADVISERS ACT

On September 18, 2015, the Monetary Authority of Singapore (MAS) issued its “Consultation Paper on Proposed Amendments to the Securities and Futures Act, Financial Advisers Act and Trust Companies Act” (Consultation Paper), which is available at the MAS website. The MAS has identified various areas under the Securities and Futures Act, Chapter 289 of Singapore (SFA), and the Financial Advisers Act, Chapter 110 of Singapore (FAA), where its supervisory powers and business conduct requirements applicable to regulated financial institutions can be further enhanced. If such proposals are implemented, they will affect SFA-regulated entities, including any real estate fund managers operating in Singapore under a capital markets services license for fund management (CMSL) or otherwise registered as registered fund management company (RFMC). The proposed changes include proposals relating to:

(i) the removal of CEOs and directors of CMSLs based on “fit and proper” criterion,

(ii) refining the change in control provisions under the SFA and FAA,

(iii) the obligation of a CMSL or RFMC to notify the MAS of adverse developments,

(iv) the ability for the MAS to grant approval to an agent of a foreign regulatory authority to inspect a CMSL or an RFMC, and

(v) penalties for failing to take reasonable care to ensure that information submitted to the MAS is not false or misleading.

For details, please find the link to
http://www.sidley.com/~/media/update-pdfs/2015/10/20151013_investment-funds-update.pdf

Source: Sidley Austin, October 2015

TAIWAN

NEW PRC-TAIWAN DOUBLE TAX ARRANGEMENT EXPECTED TO ENCOURAGE CROSS-STRAITS TRADE AND INVESTMENT

On 25 August 2015 the People's Republic of China (PRC) and Taiwan concluded six years of negotiations to sign, for the first time, a Double Tax Agreement DTA. Assuming the remaining approval procedures are completed by both parties in the remainder of 2015, the new DTA and its accompanying Appendix could take effect from as early as 1 January 2016, applying to 2016 and subsequent tax years.

The DTA provides for reduced levels of dividend, interest, royalties and capital gains withholding tax (WHT) relative to domestic rates, competitive with the best of the PRC's other DTAs. Taken together with its double tax mitigation features, the DTA is expected to enhance cross-straits trade and investment in the form of mutual direct investment. We expect this to lead to the use of simpler investment holding and operating structures and the door may also be opened to potential tax efficiency gains through restructuring.

For Details, please find the link to
http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/ChinaAlerts/Pages/China-tax-alert-1508-21-New-PRC-Taiwan-DTA-encourage-cross-straits-trade-and-investment.aspx

Source: KPMG, September 2015

OECD BEPS INITIATIVE – NEW RULES ON PERMANENT ESTABLISHMENT

On 5 October 2015 the OECD issued their highly anticipated reports on proposals to tackle what governments perceive as tax-avoidance using international tax standards (base erosion and profit shifting or BEPS). Several of these recommendations are likely to have significant implications for real estate funds. These are likely to impact expected returns in different markets and require fund managers to reconsider their holding structures and operating protocols. The key changes include significant restrictions on interest deductibility for both related- and third-party debt, changes to the taxation of hybrid instruments (which includes PPLs and REIT-like structures), measures to limit tax treaty relief and an expansion of the activities which may lead to a taxable presence being created in a country.

The exact implementation and interpretation of the reports will vary between different countries, potentially creating significant complexities and uncertainties. However, in underwriting new investments and structuring new funds, fund managers should take into account the potential impact of the changes, as well as considering their impact on current holdings and developing mitigating strategies.

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Source: KPMG, October 2015

AIFMD: ESMA UPDATES Q&A

The European Securities and Markets Authority (ESMA) has published updates to its questions and answers (Q&As) on the application of the Alternative Investment Fund Managers Directive (AIFMD). This update includes a new answer relating to central securities depositaries under Article 21 of the Directive.

The Q&A document is intended to promote common supervisory practices in the application of the AIFMD and is aimed at competent authorities under the Directive. Answers are also intended to help AIFMs by clarifying certain aspects of the rules.

For details, please find the link to
http://www.esma.europa.eu/system/files/esma-2015-1490_-_qa_aifmd_1_oct_15.pdf

Source: Clifford Chance Alert, October 2015

APEC ADVANCES ASIA REGION FUNDS PASSPORT

Asia-Pacific Economic Cooperation (APEC) has announced that Australia, South Korea, New Zealand, Thailand, Japan, and the Philippines have signed the Statement of Understanding for the Asia Regional Funds Passport (ARFP), a multilateral arrangement that will facilitate the cross-border offering of eligible collective investment schemes in the participating economies.

The statement signals the commitment of these economies to join the Passport ahead of its commencement in 2016. The statement also notes the intention of signatories to ensure that all APEC economies are able to participate in the Passport when it begins or at a time appropriate to their circumstances.

The next milestone will be the signing of the Memorandum of Cooperation by participating securities regulators by the end of 2015. The signatories aim to launch the pilot implementation in 2016.

The ARFP will remain open for participation by subsequent eligible economies from such time as is appropriate to their particular circumstances.

For details, please find the link to
http://fundspassport.apec.org/files/2015/09/Signed-Asia-Region-Funds-Passport-Statement-of-Understanding-11-Sept-2015.pdf

Source: Clifford Chance Alert, September 2015

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