

# Implementing guidelines on the investigation of COD



Implementing guidelines on the investigation of foreign taxpayer's certificate of tax domicile during the process of tax audit, tax objection, and reduction or cancellation of a tax assessment letter

On 31 May 2021, the Director General of Taxation ("DGT") issued its Circular Letter No 35/PJ/2021 ("SE-35") as an implementing guideline on the investigation of foreign taxpayer's certificate of tax domicile ("CoD") during the process of tax audit, tax objection and reduction or cancellation of a tax assessment letter.

SE-35 is issued to provide uniformity on the investigation procedures on the foreign taxpayer's CoD during the above processes as well as to provide legal certainty for dispute resolution related to a foreign taxpayer's CoD. SE-35 is effective on the date of issue.

Key aspects of SE-35 are:

1. Guidelines for a formal investigation on a foreign taxpayer's CoD during the process of tax audit, tax objection, and reduction or cancellation of a tax assessment letter:
  - a) Tax auditor and/or tax objection reviewer to investigate the fulfillment of formal requirements on a foreign taxpayer's CoD, which cover the following:
    - 1) use a prescribed format of a foreign taxpayer's CoD;
    - 2) the form is accurately, completely, and clearly filled in;
    - 3) the form is signed or is marked equivalent with the foreign taxpayer's signature in accordance with the prevailing practice in the treaty partner country or jurisdiction;
    - 4) certified by a signature or marked equivalent with a signature of the competent tax authority in accordance with the prevailing practice in the treaty partner country or jurisdiction;
    - 5) is used in accordance with the period stated in the foreign taxpayer's CoD;
    - 6) there is a statement from the foreign taxpayer that there is no tax treaty abuse; and
    - 7) there is a statement from the foreign taxpayer that it is the beneficial owner if it is required by the tax treaty.



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- b) The certification of the foreign taxpayer's CoD by the competent tax authority can be carried out by using an electronic signature provided it is a prevailing practice in the treaty partner country or jurisdiction.
- c) In case the foreign taxpayer's CoD is received by the tax auditor during a tax audit process; or received by the tax objection reviewer during a tax objection process; or during the process of reduction or cancellation of a tax assessment letter, the CoD can still be considered as a basis to implement the tax treaty provisions provided all of the formal requirements as stated in 1(a) above are met. This clarification by the DGT is welcomed and should provide clarity in cases where the relevant tax authority of the treaty partner country is unable to provide the COD in advance.
- d) If the foreign taxpayer's CoD does not state a clear validity period, the foreign taxpayer through the tax withholdee and/or tax collector can complete the CoD that has been submitted to the DGT by submitting an additional explanation regarding the validity period of the foreign taxpayer's CoD from the competent tax authority of the treaty partner country or jurisdiction; otherwise, the foreign taxpayer's CoD is deemed not meeting the formal requirement as stated in 1(a)(5).

2. Guidelines for material investigation on the foreign taxpayer's CoD during the process of tax audit, tax objection, and reduction or cancellation of a tax assessment letter:

- a) The investigation on the fulfillment of material requirements in the foreign taxpayer's CoD is carried out after the formal requirements are met.
- b) The material requirements on a foreign taxpayer's CoD are:
  - 1) there is no tax treaty abuse; and
  - 2) meeting the requirements as a beneficial owner in case required by the tax treaty; in accordance with the DGT Regulation which determines the procedures to implement a tax treaty.

SE-35 seems to imply that the beneficial owner tests section in Part VI of the Form DGT should only be completed if required by the tax treaty. However, in practice, to upload the COD on the DGT online portal as required by the regulations, Part VI on beneficial ownership requirements must still be completed otherwise the COD cannot be uploaded. It remains to be seen if in practice the DGT will change its online portal to allow for Form DGT to be uploaded without completing Part VI - e.g. when the concerned income is not dividend, interest or royalty.

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APAC No. 00000538

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