Building a better working world

EY Tax Alert

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Malaysian developments

Update to the Automatic Exchange of Financial Information Rules and Regulations

As highlighted in earlier tax alerts, the following Rules and Regulations were gazetted to stipulate amongst others, the due diligence obligations, reporting obligations, record-keeping requirements, appointment of third parties to carry out the obligations and anti-avoidance provisions that would apply to Reporting Financial Institutions (RFIs) (as defined):

- Income Tax (Automatic Exchange of Financial Account Information) Rules 2016 [P.U.(A) 355], gazetted on 23 December 2016 (see *Tax Alert No. 2/2017*);
- Income Tax (Automatic Exchange of Financial Account Information) (Amendment) Rules 2017 [P.U.(A) 403], gazetted on 22 December 2017 (see *Tax Alert No. 1/2018*); and
- Labuan Business Activity Tax (Automatic Exchange of Financial Account information) Regulations 2018 [P.U.(A) 20], gazetted on 5 February 2018 (see *Tax Alert No. 4/2018*)

The above-mentioned Rules and Regulations were recently amended via the following, which were gazetted on 4 September 2020:

- Income Tax (Automatic Exchange of Financial Account Information) (Amendment) Rules 2020 [P.U.(A) 267]; and
- Labuan Business Activity Tax (Automatic Exchange of Financial Account Information) (Amendment) Regulations 2020 [P.U.(A) 266]

Both the Amendment Orders provide that for the purpose of the Common Reporting Standard (CRS), an "Excluded Account" is to be defined as a depository account which is dormant (other than an Annuity Contract):

(a) With a balance that does not exceed USD1,000;
(b) Where the account holder has not initiated a transaction with regard to the account or any other accounts held by the account holder with the RFI in the previous three (3) years;
(c) Where the account holder has not communicated with the RFI regarding the account or any other accounts held by the account holder with the RFI in the previous six (6) years; and
(d) In relation to a Cash Value Insurance Contract, where the RFI has not communicated with the account holder regarding the account or any other accounts held by the account holder with the RFI in the previous six (6) years

Note:
Previously, the term "Excluded Account" included a securities account which is a dormant account under rule 26.10 of the Rules of Bursa Malaysia Depository Sdn Bhd. This has now been removed.

Income tax exemption for export of private healthcare services

Currently, taxpayers providing private healthcare services are eligible for a partial tax exemption on income derived from the export of healthcare services to foreign clients*. The income tax exemption is equivalent to 50% of the value of increased exports of services and the exemption can be set-off against 70% of statutory income.

In Budget 2018, to promote growth in healthcare services in Malaysia and establish Malaysia as a healthcare hub for foreign patients, it was proposed that the tax exemption on income derived from the export of healthcare services to foreign clients* either in Malaysia or from Malaysia be increased from 50% to 100% of the value of increased exports of services, to be set-off against 70% of statutory income, with additional conditions.

To legislate the above-mentioned proposal, the Income Tax (Exemption) (No. 9) 2002 (Amendment) Order 2020 [P.U.(A) 269] was gazetted on 8 September 2020.

The income tax exemption will apply only if the following conditions are met:

(a) At least 10% of the taxpayer's total number of patients consist of foreign clients* who have obtained private health care services in each year of assessment (YA); and
(b) At least 10% of the company's gross income is derived from foreign clients* who have obtained private healthcare services in each YA

*A foreign client has been defined in Income Tax (Exemption) (No. 9) Order 2002 [P.U.(A) 57] to mean:

i. a company, a partnership, an organization or a co-operative society which is incorporated or registered outside Malaysia;
ii. an individual who is a non-Malaysian citizen and does not hold a Malaysian work permit; or
iii. an individual who is a non-resident Malaysian citizen living abroad.

The Amendment Order is effective from YA 2018 to YA 2020.

Update on management and control requirements for pure equity holding Labuan entities

As highlighted in an earlier tax alert, on 10 August 2020 the Labuan Financial Services Authority (LFSA) issued a Directive on Management and Control Requirements for Labuan Entities that Undertake Pure Equity Holding Activities (Directive). The Directive applies to all Labuan entities that are incorporated, registered or established under the relevant Labuan legislations and that undertake pure equity holding activities (see *Tax Alert No. 14/2020*).

The Directive sets out the management and control requirements, which include complying with Paragraph 5.5 of Public Ruling (PR) No. 5/2011. However, the PR discusses management and control requirements in Malaysia generally, and is not Labuan-specific. The LFSA has now issued a follow-up circular dated 10 September 2020 to clarify that such Labuan entities would be required to hold their board meetings in Labuan at least once a year, to satisfy the said requirement, i.e. holding a meeting in other parts of Malaysia would not be sufficient. The circular also stipulates that the Directive is effective from YA 2021 (i.e. financial year ending in 2020) onwards.

Notwithstanding the above, the LFSA also clarified that given the current travel restrictions due to the COVID-19 pandemic, the said board meeting requirement would be considered satisfied if the meeting was conducted virtually, and on condition that the hosting of the meeting was arranged by the resident secretary of the pure equity holding entity in Labuan.

Guidelines on stamp duty exemption for Small and Medium Enterprises on any instrument executed for mergers & acquisitions

Under the Short-term Economic Recovery Plan (PENJANA) announced on 5 June 2020, the Government proposed to waive the stamp duty on any instrument executed by Small and Medium Enterprises (SME) for mergers & acquisitions (M&A) (see *EY Take 5: COVID-19: Short-term Economic Recovery Plan*). The exemption would apply between 1 July 2020 and 30 June 2021.

Following the above, SME Corporation Malaysia (SME Corp) has published on its website the "Guidelines & Procedures on Incentive of Stamp Duty Exemptions on M&A by SMEs" (Guidelines) to provide guidance on the above-mentioned exemption. Some of the key points are outlined below.

M&A instruments which qualify for the stamp duty exemption

The Guidelines provide that the stamp duty exemption would apply to the following M&A-related instruments:

- Contract or agreement for the sale or lease of property (including land, building, machinery and equipment);
- Instruments of Transfer and Memorandum of Understanding (MoU);

- Loan or financing agreements
- First tenancy agreements

Eligible services and criteria

The Guidelines stipulate that all economic sectors are eligible for the incentive. The following conditions must be met in order to qualify for the incentive:

- The SME must be 100% Malaysian-owned; and
  - Have an annual sales turnover of less than RM50 million or full-time employees of less than 200, as per the definition of SMEs in the manufacturing sector[Note]; or
  - Have an annual sales turnover of less than RM20 million or full-time employees of less than 75, as per the definition of SMEs in the services sector[Note]
- The SME status of the entity must be validated through the SME Registration Status System; and
- The M&A exercises are undertaken between 1 July 2020 and 30 June 2021.

Note:
It is noted that per the definition of SME by SME Corp, the criteria are for the SME to:

- Have an annual sales turnover *not exceeding* RM50 million or full-time employees *not exceeding* 200, for the manufacturing sector; or
- Have an annual sales turnover *not exceeding* RM20 million or full-time employees *not exceeding* 75, in the services sector

Application mechanism

This initiative is led by the Ministry of Entrepreneur Development and Cooperatives (MEDAC), and SME Corp is the Secretariat to the Joint Verification Committee (JVC) meeting. The Guidelines stipulate that all applications are to be submitted to SME Corp for verification purposes. Qualified and eligible applications will be tabled at the JVC meeting for endorsement and approval.

The Guidelines provide that upon approval or rejection by the JVC, MEDAC will issue a letter notifying the applicant accordingly. If rejected, the said applicant may re-apply. Successful applicants are required to submit the relevant chargeable and eligible instruments together with a copy of the approval letter, to the IRB for approval. Upon obtaining IRB's approval, the applicant will receive a stamp certificate endorsement.

The Guidelines also outline the M&A exercises that would qualify for the incentive, as well as a flowchart to demonstrate the process of the application, which are outlined in Appendices I and II to this Alert.

Overseas developments

The Netherlands publishes 2021 budget proposals

On 15 September 2020, the Dutch Government published the Dutch budget proposals (the Proposals) for fiscal year 2021.

The Proposals announce a €2 billion workforce incentive plan for employers that will boost workforce investment activities, both increasing new employment and securing the retention of employees. Additionally, the Dutch Government continues to combat perceived abusive tax structures in line with international tax proposals and has introduced further measures to support economic recovery from the COVID-19 crisis. In order to fund the incentives/stimulus package, the planned reduction of the headline corporate income tax rate (CIT) to 21.7% will not be introduced in 2021. Furthermore, the Proposals include a tax agenda, outlining expected legislative measures for the coming periods.

The Proposals are currently subject to review and discussions by the Dutch Parliament and as such, may be subject to amendments. The final versions of the Proposals are expected to be enacted in December 2020.

Detailed discussion

CIT rate

As per fiscal year (FY) 2021, the Dutch CIT rate in the first bracket will be reduced to 15% and the amount of taxable income to which this applies will increase from €200,000 to €245,000 (FY 2022: €395,000). The top Dutch corporate income tax rate will remain at 25%, i.e., the earlier enacted reduction to 21.7% will not happen in 2021.

Effective tax rate for innovation box regime

The effective applicable tax rate for the innovation box regime will increase from 7% to 9%.

Introduction of a job-related investment discount (BIK)

The *Baangerelateerde Investeringskorting* (BIK) provides for a payroll tax reduction for companies investing in employment. The measure will be introduced as an amendment to the Proposals and is set to enter into force by 1 January 2021. The budgetary amount allocated is €2 billion.

COVID-19 related measures

Several COVID-19 measures previously taken by the Dutch Government have been set forth in the legislative proposals. These include the possibility for Dutch taxpayers to utilise their "corona-related losses" from FY 2020 against their profits in FY 2019 by introducing a "corona reserve" (instead of waiting for the FY 2020 tax loss to carry back to FY 2019).

Utilization of tax losses

Under the announced measure, it is proposed that losses may be carried forward indefinitely. However, the offset of losses will be limited in a given year against the first €1 million of taxable profit. For taxable profit in excess of this amount, losses may only be offset against up to 50% of this excess. The measure will be introduced as an amendment to the Proposals, and if enacted, is set to enter into force by 1 January 2022.

Interest deduction limitations

Further guidance is proposed to address certain overlapping situations of the Dutch anti-hybrid rules and the other interest deduction limitation rules.

In addition, amendments to existing anti-base erosion rules have been announced. The anti-base erosion rules currently also apply to negative interest and foreign currency (FX) gains relating to tainted debt, as a result of which the corresponding income is effectively exempt. It is now proposed that this rule will not apply to such negative interest and FX gains to the extent they would otherwise reduce the taxable amount (i.e., after netting with interest expense). This should be determined per loan.

Liquidation loss rules

Under the liquidation loss rules, a Dutch taxpayer can – under certain conditions – deduct losses resulting from ceasing foreign businesses or liquidating subsidiaries. To the extent these losses exceed €5 million, these will be restricted to subsidiaries or permanent establishments in a European Union (EU) or European Economic Area (EEA) country and only if the interest in the subsidiary or permanent establishment is more than 50% (instead of at least 5% as provided under previous rules).

Tax agenda of future tax measures

The Proposals include a tax agenda for certain future tax measures by the Dutch Government for which no proposed legislation is available. The measures include:

- Limitation on downward transfer pricing adjustments to the extent no corresponding upward adjustment is made. Under the proposed measure, a transfer pricing adjustment that results in a reduction of Dutch taxable profit is only allowed to the extent the corresponding income is included in the taxable income at the recipient level. The legislative proposal to implement this change is expected by Spring of 2021.
- Research into a more equal taxation of equity and debt. The Dutch Government is currently conducting research to introduce a taxable deduction on equity, combined with a further limitation on the deduction of interest through an amendment to the existing earnings-stripping rule.
- Amendment to the credit for certain withholding taxes against Dutch CIT, for certain investors. The Dutch Government intends to introduce legislation that limits the availability of a refund of dividend withholding (and gambling) tax to Dutch corporate taxpayers, pursuant to the Sofina court case of the European Court of Justice (C-575/17). While such legislation is pending, the Dutch Government aims to issue a Decree that will, under conditions, allow foreign taxpayers to obtain a refund of these withholding taxes. The Decree is expected shortly.
- Introduction of a conditional withholding tax on dividends. The Dutch Government aims to introduce additional tax measures related to payments of dividends to shareholders resident in low-tax jurisdictions or in jurisdictions included in the EU's list of non-cooperative jurisdictions. Such measures would also apply in certain perceived abusive situations. The applicable tax rate will equal the headline CIT rate (i.e., currently 25%). The legislative proposal is expected by Spring 2021, and if enacted, is set to enter into force by 1 January 2024.
- Fiscal unity regime – in June and July of 2019 an internet consultation took place regarding the future of the Netherlands' fiscal unity regime following certain EU court cases. Given the complexity of the matter and the potential impact on the overall Dutch tax regime, any changes to the fiscal regime will be left to the discretion of the new Government (general elections will be in March 2021).

Sweden prepares to tax foreign employees with a Swedish economic employer

The Swedish Government has proposed introducing an economic employer concept within the Swedish tax legislation for certain situations. When interpreting Swedish tax legislation for non-residents as well as when interpreting certain tax treaties, an employer will be defined not by the organization that pays the remuneration, but by the entity that benefits economically from the work.

A Swedish tax liability will therefore arise for many foreign employees working temporarily in Sweden, and the foreign employer will have Swedish reporting obligations. The legislative changes are proposed to be applicable from 1 January 2021.

Background

Under the current Swedish tax legislation, a legal or formal employer concept is used. This means that the assessment of who is considered the employer, is based on who actually pays the employee's remuneration. The formal employer concept will, according to the proposed legislation, still be used in Sweden going forward. However, in certain situations, an economic employer concept will be used instead. This approach is now used in a number of countries around the world when interpreting local laws and the dependent services article (covering remuneration paid to employees) of double taxation treaties.

When introducing a so-called economic employer concept, several other factors will be taken into account instead, such as who the work is carried out for, who bears the risk of the employees' work and who benefits from it. Who bears the cost and who gives instructions to the employee will also be considered.

This will impact the analysis of whether foreign employees are liable to tax in Sweden for their work performed in Sweden.

Details

According to the main rule within the Special Income Tax Act for non-residents (SINK), employees are liable for Swedish tax for their work performed in Sweden. The 183-day rule in the SINK legislation can however limit this tax liability if the following conditions are met:

- The employee spends not more than 183 days in Sweden in a 12-month period;
- The remuneration is not paid by or on behalf of an employer who is domiciled in Sweden; and
- The remuneration is not borne by a permanent establishment that the foreign employer has in Sweden.

In the proposed legislation, the above exemption will not be applicable if the employee's work can be seen to involve hiring of labor to a Swedish company, i.e. to a Swedish economic employer. Hiring of labor means that the individual is directly or indirectly made available by a foreign employer to perform work in a company's business in Sweden and the work is performed as an integrated part of that company's activities and under the Swedish company's control and management. Further clarification on the "hiring out of labor" concept may be forthcoming in future Swedish case law and guidelines, but it is believed to also include intra group assignments.

It has however been suggested that some exemptions will apply to limited working days in Sweden.

According to the proposal, the regulation regarding hiring of labor should not apply if the work in Sweden is carried out for a maximum of 15 consecutive days and for a maximum of 45 days per calendar year. Furthermore, if the 45 days threshold is exceeded, only the exceeding days should be evaluated (and possibly reported) to determine if the work in Sweden can be seen as hiring out of labor. This will to some extent limit the number of foreign employees who will become tax liable in Sweden.

See examples below:

Example 1
If a foreign employee works in Sweden for nine consecutive days during six different stays in Sweden in one calendar year, the first five trips to Sweden will fall under the exemption. The reason for this is that all stays are fewer than 15 consecutive days and not more than 45 days during the full calendar year. The sixth trip however will need to be evaluated to confirm if the work in Sweden can be seen as hiring out of labor.

Example 2
In the same example, if the first visit to Sweden amounted to 16 consecutive days, this first trip will need to be evaluated to assess if the work in Sweden can be seen as hiring out of labor. The first period in Sweden (16 days) should not, however, be taken into account when calculating the 45 days threshold in the calendar year.

Once a Swedish tax liability has been confirmed according to Swedish domestic legislation, applicable tax treaties should be applied to avoid double taxation with regard to the temporary work in Sweden. However, since the Swedish Government chose to include an exemption to the so-called 183-day rule in the SINK legislation, it is somewhat unclear how double tax treaties should be applied going forward.

In the Nordic tax treaty, there is an exception for hiring of labor where an economic employer concept should be used within the Nordics if applicable. However other tax treaties generally do not include this hiring of labor exception. In EY's view, the 183-day rule may then be applicable in many cases going forward such that a Swedish tax liability could possibly be avoided for tax residents in Sweden with e.g. its center of vital interest in the other country, provided that the other requirements are fulfilled. Case law will determine the application of tax treaties going forward.

The suggested legislation will lead to increased employer obligations in Sweden for foreign employers. It is proposed that foreign legal employers without a permanent establishment in Sweden be required to withhold preliminary tax for their employees, to the extent that the work has been performed in Sweden for a local economic employer. The foreign employer paying out the salary must then register as an employer in Sweden to be able to file monthly employer PAYE returns and report and pay the withheld preliminary tax to the Swedish Tax Agency. According to the proposed legislation, this obligation cannot be satisfied by the entity who is considered to be the Swedish economic employer.

Next steps

The proposed legislation will come up for vote in the Swedish Parliament shortly and is expected to be approved and to take effect from 1 January 2021. This will lead to more foreign employees being liable to tax in Sweden and foreign employers having Swedish employer obligations.

In order to meet the new requirements, foreign employers should review their employees' travel patterns and work tasks in Sweden in order to identify circumstances which could result in Swedish obligations.

The significantly-reduced movement of short-term workers and business travelers into Sweden due to the COVID-19 pandemic creates an opportunity for foreign employers to prepare for the new rules.

Once Swedish employer obligations have been confirmed, the following actions should be taken:

- Necessary employer registrations with the Swedish Tax Agency
- Establish a monthly wage tax withholding system in Sweden
- Tax filing in Sweden for the employees
- Establishment of an internal process to track workers and business travelers into Sweden in order to identify employees who are not on formal assignments but who create a liability under this rule

Types of M&A exercises that would qualify for the stamp duty exemption

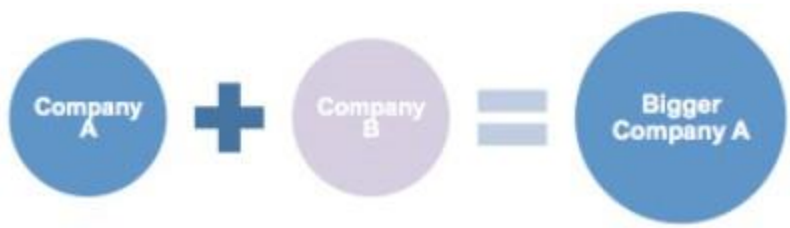
Option 1 – Two business entities merged to become a new business entity

Business entity A merged with business entity B to become a new business entity C. Both individual business entities A and B will be dissolved to form business entity C. In order to enjoy the incentive, the existing business entities A and B need to be dissolved to form business entity C. This applies to all existing sole proprietorships, partnerships, limited liability partnerships (LLPs) and private limited companies (PLCs) in the eligible service sub-sectors or areas.

The documentation checklist for a merger activity is as follows:

- MoU or legal contract between the interested parties to formalize the merger process
- Notice of termination of registered business for sole proprietor, partnership, LLP or PLC
- Certificate of Incorporation of Private Company (Form 9)
- Latest audited or management accounts of existing business entities
- New license or permit or approval from Ministries and Agencies, professional bodies, regulatory boards and associations for the new entity
- A copy of the latest corporate information (business information, LLP information, company information) and organization chart of the business entity

Option 2 – Merger of two or more existing business entity

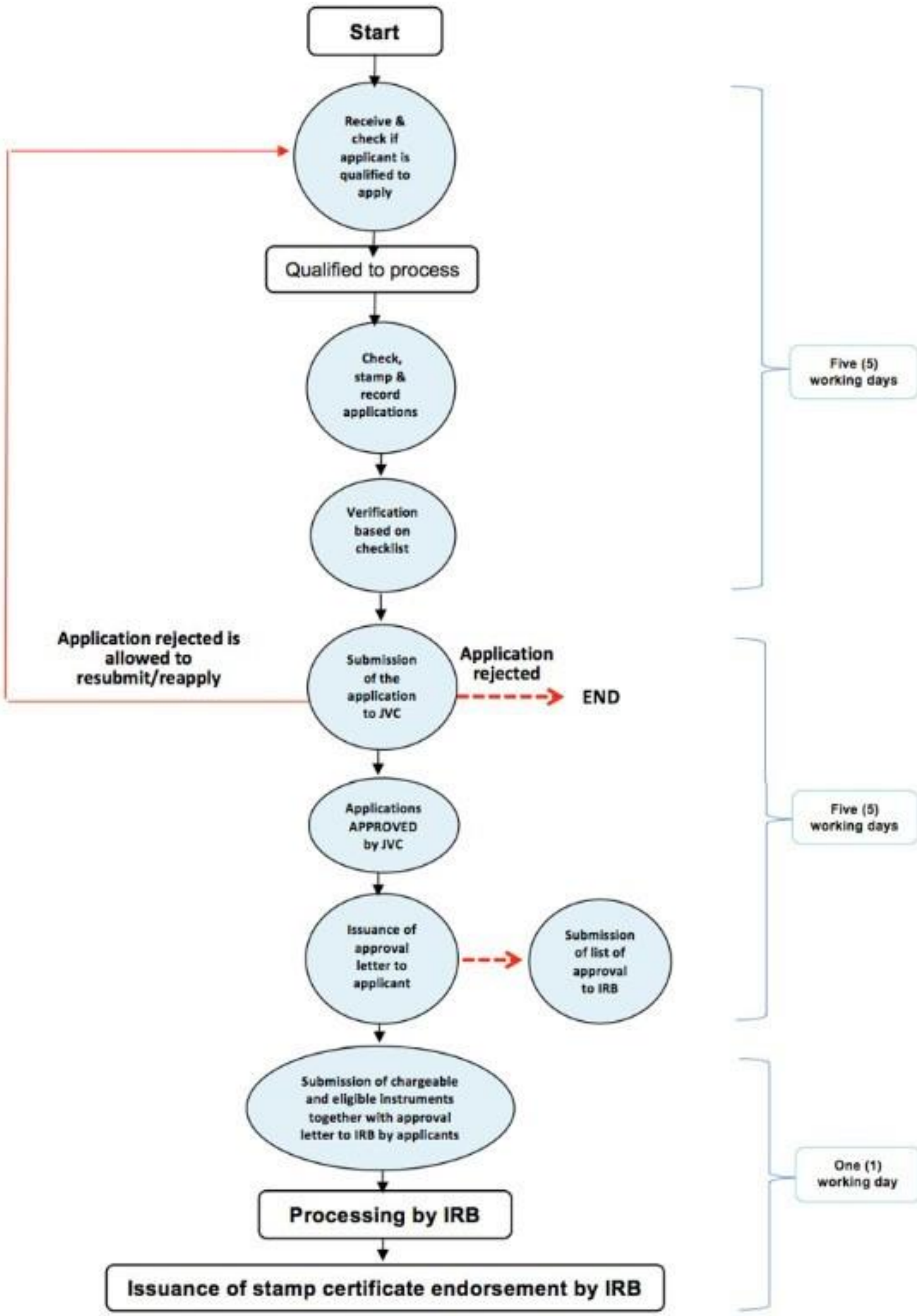


Business entity A acquires business entity B to become a new bigger business entity A. Business entity B need to be dissolved for business entity A to qualify for this incentive. This applies to all existing sole proprietorships, partnerships, LLPs and PLCs in the eligible service sub-sectors or areas.

The documentation checklist for an acquisition activity is as follows:

- MoU or legal contract between the interested parties to formalize the acquisition process
- Notice of termination of registered business for sole proprietor, partnership, LLP or PLC
- Latest audited or management accounts of existing business entities
- Valid license or permit or approval from Ministries and Agencies, professional bodies, regulatory boards and associations
- A copy of the latest corporate information (business information, LLP information, company information) and organization chart of the business entity

Flowchart on the process of application for the stamp duty exemption in relation to M&A exercises



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Important dates

Note: Please see EY Special Tax Alert No. 11/2020 and EY Special Tax Alert No. 12/2020 for information on the grace periods which have been provided to help businesses cope with the Movement Control Order.

30 September 2020	6th month revision of tax estimates for companies with March year-end
30 September 2020	9th month revision of tax estimates for companies with December year-end
30 September 2020	Statutory deadline for filing of 2020 tax returns for companies with February year-end. As a concession, this deadline is extended to 30 November 2020 pursuant to the updated Return Form (RF) Filing Programme.
15 October 2020	Due date for monthly instalments
31 October 2020	6th month revision of tax estimates for companies with April year-end
31 October 2020	9th month revision of tax estimates for companies with January year-end
31 October 2020	Statutory deadline for filing of 2020 tax returns for companies with March year-end. As a concession, this deadline is extended to 31 December 2020 pursuant to the updated RF Filing Programme.

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