TAX IMPLICATIONS IN RELATION TO ICOS

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In a previous article of our on-going discussions on cryptocurrency in Singapore, we introduced the process and potential legal and regulatory ramifications of an initial coin offering ("**ICO**"). With blockchain-based technology and cryptocurrency gaining popularity despite the current bearish market sentiment, ICOs have demonstrated their potential as an alternative and viable means of raising capital and growing a user base for start-ups. In this article, we explore some tax issues relating to ICOs in Singapore.

1. Nature and characterisation of tokens issued

When a company in Singapore issues tokens to purchasers by way of a pre-sale or an ICO, these tokens may confer certain rights to the purchaser in respect of the business or the product(s) produced by it. Information on the functions or utility of the tokens and the rights that the tokens confer on token purchasers are set out in the whitepaper or the token purchase agreement. In an earlier article, we summarized the key aspects of the Guide on Digital Token Offerings in Singapore issued on 14 November 2017 by MAS and concluded that the legal nature of a token would determine whether it is regulated by Singapore law and regulations.

There is no capital gains tax in Singapore. Hence, in determining whether, how and when the proceeds from an ICO would be taxed in the hands of the token issuer (i.e. the company issuing the tokens to the purchaser), the first question is whether these proceeds would constitute an income or a capital gain. The answer would depend in each case, on the legal characterisation of the issued tokens. If the tokens are 'securities (or security) tokens', the proceeds from the sale of such tokens may be regarded as capital gains

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and therefore, may not be subject to income tax.

If the particular tokens constitute "non-securities" tokens or in common parlance, "utility tokens", the sale proceeds of such tokens may be regarded as income and therefore be subject to income tax.

2. Where the ICO proceeds are sourced and received

If the proceeds of the sale of tokens in an ICO are regarded as income, the taxability of this income would depend on where the source comes from. Under the Income Tax Act (Chapter 134) ("**ITA**"), the corporate tax of 17% is payable on two bases. Firstly, the territorial basis dictates that income is taxable if it accrues in or is derived from Singapore. Secondly, under the remittance basis, income is taxable if it is earned from outside Singapore but is received in Singapore.

The determination of whether the income was derived from or accruing in Singapore is a question of fact and will vary case-by-case. The Court of Appeal in Singapore in the case of *Comptroller of Income Tax v HY* adopted a practical approach based on what a practical man would regard as the real source of income with the broad guiding principle being to identify what the taxpayer had done which earned him the gains or profits in question and then to identify the location where this work had taken place. Even if the income is deemed to be foreign-sourced, income tax is still payable if it is remitted to, transmitted or brought into Singapore, if it is applied towards the satisfaction of any debt incurred in respect of a trade or business carried on in Singapore or if it is applied to purchase any movable property which is brought into Singapore.

Finally, it must be remembered that income which is foreign-sourced and not received in Singapore could be subjected to higher income tax rates overseas.

3. Tax assessment of ICO proceeds

Considering that the "utility tokens" may not be used until such time the proposed blockchain platform is fully developed and is interoperable with the tokens, there is an issue as to the point of time at which income tax should be assessed.

Conventional tax law regards income to be taxable only when the taxpayer has earned the income and the supply of virtual currencies may constitute a supply of services which may be taxable.
The point in time of assessment would also depend on the precise wording of the terms and conditions expressed in each ICO's whitepaper, token purchase agreement or included with the token purchase order and the rights granted to holders of the tokens. Where the terms and conditions of an ICO specify that there shall be, in any event, no refund of the purchase price of the tokens paid to the token issuing company, the purchase price received by the token issuing company may be deemed taxable as income earned at the point in time when the purchase price is received by the token issuing company, even if at that point in time, no tokens have yet been delivered to the purchaser.

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4. Determining whether GST is chargeable

Under the Goods and Services Tax Act (Chapter 117A) ("**GSTA**"), any supply of goods or services made in Singapore will be subject to Goods and Services Tax ("**GST**") where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

The GSTA regards a person or entity as a taxable person if he is or is required to be registered for GST. A person is liable to be registered for GST if (i) at the end of any quarter where the taxable turnover in that quarter and the three quarters immediately preceding that quarter has exceeded SGD1 million or (ii) at any time, there are reasonable grounds for believing that the taxable turnover in the period of 12 months then beginning will exceed SGD 1 million.

Whether a supply is made in Singapore depends on characteristics of the issuing entity

A supply of services would be regarded as being made in Singapore if the supplier belongs in Singapore and would be regarded as being made in a foreign country if the supplier belongs to that foreign country. The supplier would be treated as belonging in a particular country if he has a business or fixed establishment in the country and no such establishment elsewhere or, if there is no such establishment in any country, wherever his usual place of residence is. Thus, an issuing entity will be taken to belong in Singapore if it is incorporated in Singapore. However, for token issuers incorporated overseas, an analysis may be required to properly determine its usual place of residence or establishment.

5. Conclusion

From the potential tax implications discussed above, tax regulations in relation to ICOs are still in a state of uncertainty. It is thus vital for companies who plan to raise funds through ICOs to obtain legal and specialist tax advice before embarking on their ventures. This will enable companies to minimise tax inefficiencies and avoid unintended fiscal consequences.

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