

Summary of Responses – Public Consultation on the Proposed Adoption of a Rights-Based Approach for Characterising Software Payments and Payments for the Use of or the Right to Use Information and Digitised Goods

IRAS conducted a public consultation between 16 April 2012 and 14 May 2012 to seek feedback on whether the adoption of the rights-based approach to characterise certain payments and the consequential removal of the existing withholding tax exemption regimes will provide greater clarity and certainty to businesses.

IRAS received submissions from 5 respondents on the public consultation paper during the consultation period. IRAS wishes to thank all respondents for taking the time to provide their comments.

IRAS has considered carefully all the comments received. A summary of the key comments received and our responses are as follows:-

A. Scope of proposed rights-based approach

1. Distinction between copyright right and copyrighted article

Comment: The distinction between copyright right and copyrighted article establishes that certain transfers of copyright rights that allow a payer to commercially exploit the right generate royalties. Therefore it must mean (conceptually) that all other payments (that do not allow the payer to commercially exploit the rights) generate business income. This distinction (i.e. between “payments for transfer of copyright right” and “all other payments”) should be introduced as a key element of the proposed change.

IRAS’ response: Generally, the suggested distinction allows for a wider than intended scope for the tax treatment of copyrighted article. Not all payments that do not allow the payer to commercially exploit the rights would constitute business income for Singapore withholding tax purposes.

As a clarification, payments for the rendering of services involving the use of software, information or digitised goods do not constitute business income for Singapore withholding tax purposes. These payments remain as payments for the provision of services to which the provisions under section 12(7)(b) of the Income Tax Act (“ITA”) apply.

2. Payments for use of software, information and digitised goods

Comment: Payments for the right to use or have access to software, information and digitised goods for any length of time constitute business income, if the payer is not entitled to commercially exploit the software, information or digitised goods.

IRAS’ response: The specified payments will be considered business income as long as the user has only acquired the right to use the copyrighted article and not the copyright right.

3. Essential or primary purpose of payment

Comment: The characterisation of a payment should be determined based on the essential/ primary purpose or objective behind the payment and should not be affected by any incidental use of a copyright right.

IRAS' response: Agreed. We accept the suggestion as we understand that certain transactions may carry some form of incidental copyright rights, such as those prescribed under the Copyright Act¹.

4. Payments under section 12(7)(a) & (b) of the Income Tax Act (“ITA”)

Comment: It is uncertain as to whether the rights-based approach applies to all payments under section 12(7)(a) & (b) of the ITA. It would be good to make clear that the rights-based approach is not restricted to payments for software, information and digitised goods if that is the policy intent.

IRAS' response: The adoption of the rights-based approach is intended to cover only payments for software, information and digitised goods and not other payments under section 12(7)(a) & (b) of the ITA.

5. Payments exempt under the current tax exemption regime

Comment: All payments under the current withholding tax exemption regime should be clearly covered under the transfer of a copyrighted article treated as business income in the hands of the transferor. In addition, payments in scenarios explicitly spelt out in the existing IRAS e-Tax Guides as exempt from withholding tax should not be regarded as royalty payments under the proposed rights-based approach.

IRAS' response: As the principles underlying the existing withholding tax exemptions for payments made for software, information and digitised goods are consistent with those applied under the rights-based approach, payments that are currently exempt will be treated as payments for copyrighted articles and not royalty under the rights-based approach. We note the request for inclusion of all scenarios/ examples under the exemption regime and will cover these and updated examples where appropriate in the new e-Tax Guide.

B. Definition of terms used

Comments: There is a need for greater clarity in various terms used in explaining the rights-based approach.

IRAS' response: To provide clarity, we will include more detailed definitions (and examples, where appropriate) for terms such as “software”,

¹ For example, sections 39A and 39B of the Copyright Act

“information”, “digitised goods”, “copyright rights”, “copyrighted articles”, “commercial exploitation” and “complete alienation” in the new e-Tax Guide.

C. Double tax relief

Comment: The rights-based approach should not result in taxpayers being denied foreign tax credit for foreign withholding tax suffered on inbound royalty income in the event that the income is characterised differently by the source country.

IRAS’ response: Where there is a tax treaty (“DTA”) between the source country and Singapore, a double tax relief will be available to the Singapore tax resident if the payment falls within the scope of the DTA and the conditions for allowing a double tax relief are fulfilled.

Where the payment is received from a non-treaty jurisdiction, an unilateral tax credit will be available to the Singapore tax resident if the payment is:

- (a) a royalty (received for the transfer of the right to commercially exploit the copyright right), or
- (b) a trade income derived through a permanent establishment in the non-treaty jurisdiction from the sale of copyrighted articles, and

the conditions in section 50A of the ITA are fulfilled.

D. Compliance requirements

Comment: Clarity is needed on how the rights-based approach translates for compliance purposes and the documentation required to support the use of the rights-based approach.

IRAS’ response: No upfront approval is required for taxpayers to use the rights-based approach. Taxpayers are to evaluate and ascertain the nature of payments using the rights-based approach to determine the correct tax treatment for such payments. Supporting documents such as licence agreements or intercompany agreements and invoices should continue to be maintained so that these can be provided if required for review by IRAS.