Plenary 2 - New International Tax Developments in Asia

Chair

- Shigeki Minami (Nagashima Ohno & Tsunematsu, Japan)

Panelists

- Yishian Lin (Chung-Hua Institution for Economic Research, Host)
- Andrew Choy (EY China)
- Sushil Lakhani (Sushil Lakhani & Associates, India)
- Vanida Vasuwanichchanchai (PwC Thailand)
- Kok Choy Har (Inland Revenue Board of Malaysia)
- Emile Bongers (Stibbe Dubai B.V., UAE)

Overall Trend in International Taxation in Asia

Taiwan : Yishian Lin

I. The new pass-through taxation for partnerships (LLPs)

II. Tax incentives in Taiwan

New Legislation

General Partnership

- Pass-through Entity.
- Amendment to Article 71 of Income Tax Act (ITA) effective from 1 January 2018.

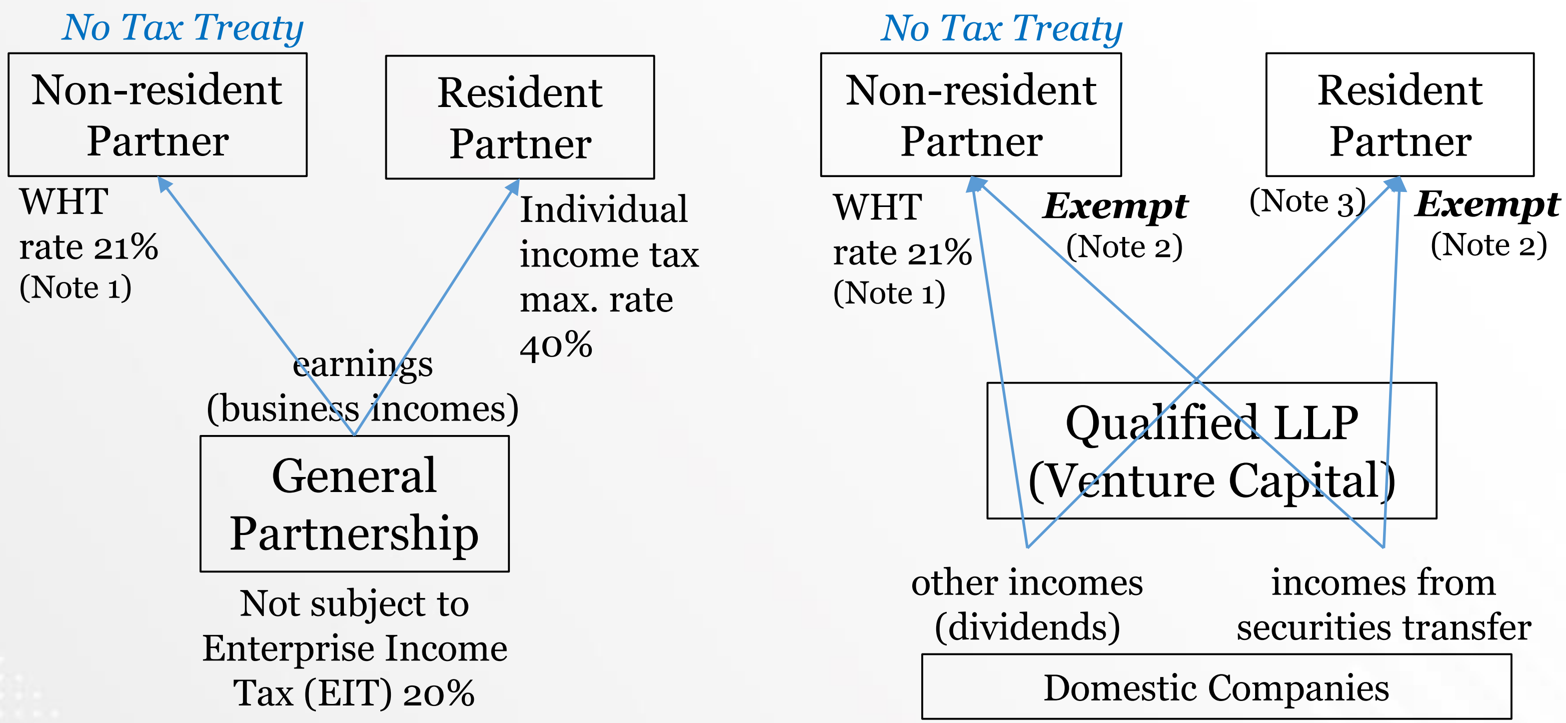
Limited Liability Partnership (LLP)

- Non-pass-through entity.
- Amendment to Article 42 and 71 of ITA effective from 1 January 2018 (LLP is defined as a “Other Legal Person”).

Venture Capital LLP

- Conditionally qualified pass-through entity if LLP is organized as a venture capital enterprise.
- Amendment to Article 23-1 of Industrial Innovation Statute effective from 22 November 2017.

Partnership Pass-Through Taxation

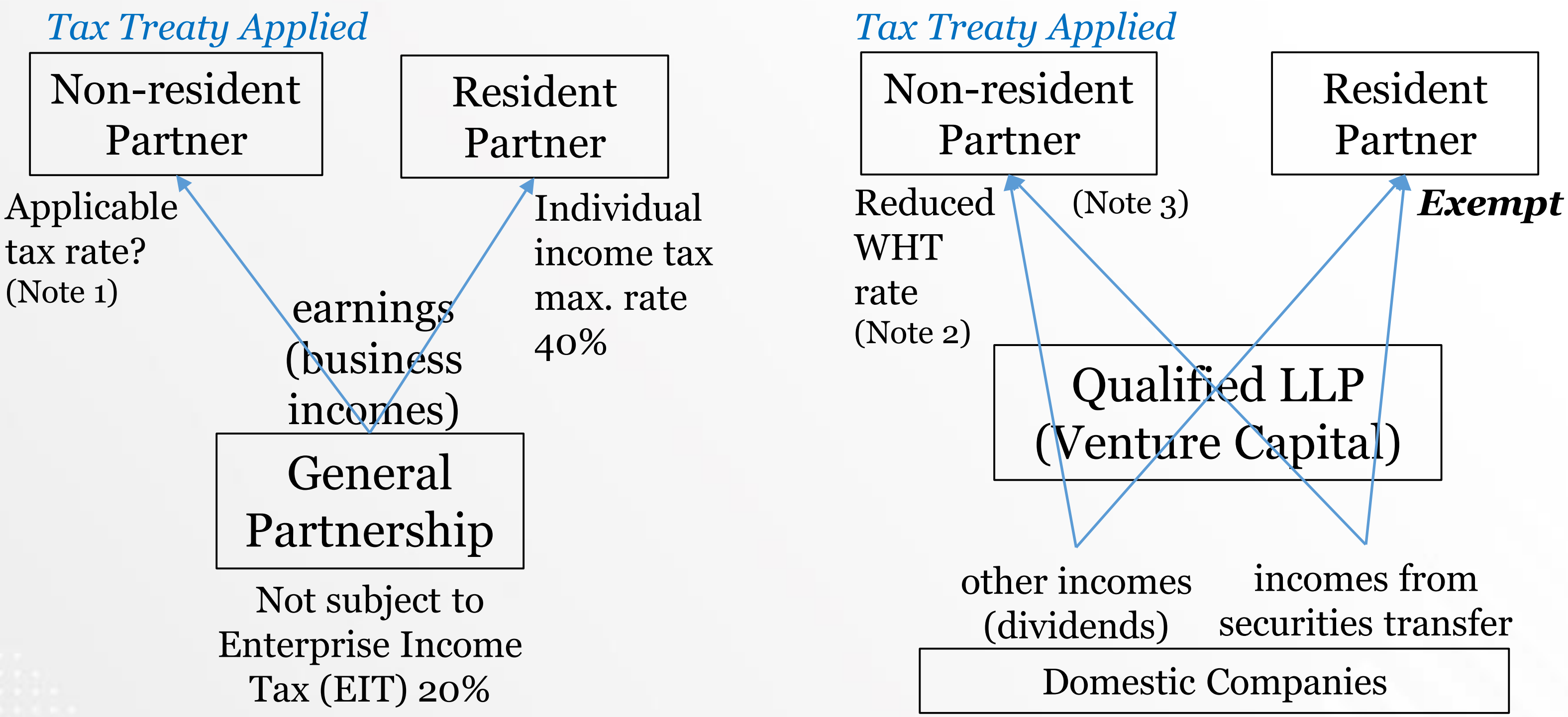


(Note 1) Dividends and earnings distributed to non-residents are subject to WHT rate 21% from 1 January 2018.

(Note 2) According to Article 4-1 of ITA, incomes from securities transfer is exempt.

(Note 3) Dividends from domestic companies attributed to resident individuals partners are subject to individual income tax at 28% (amended Article 16 of ITA); if attributed to resident companies are exempt (amended Article 42 of ITA)

Partnership Pass-Through Taxation

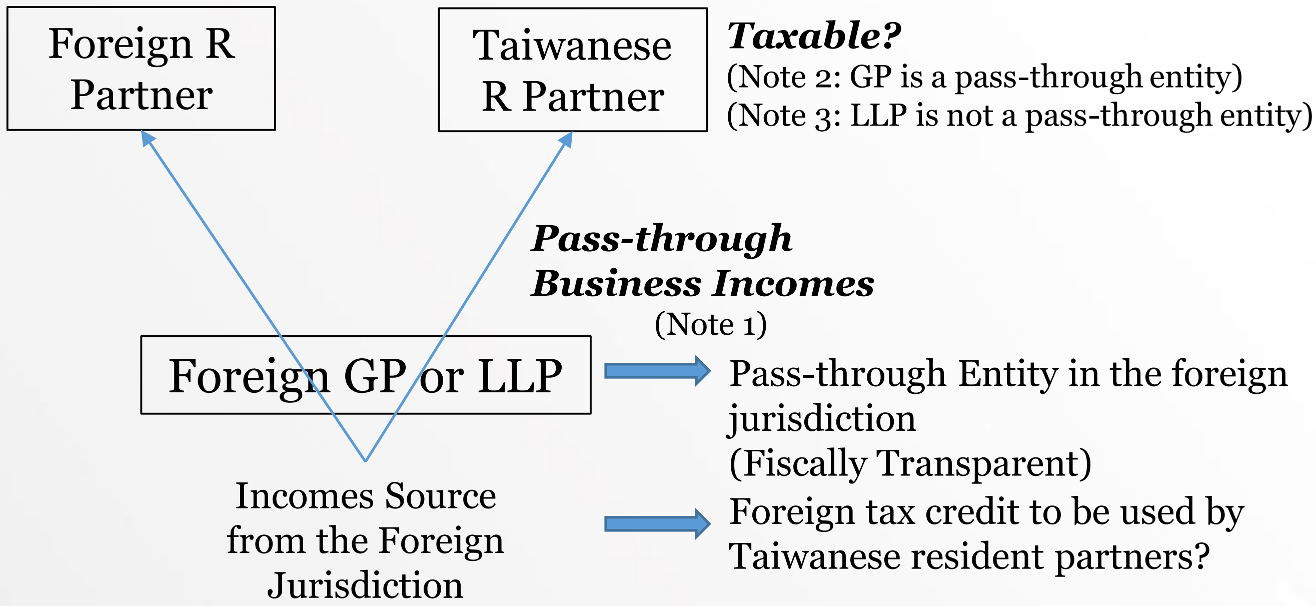


(Note 1) Earnings from general partnerships may be applicable to Article 10 of tax treaty "*Dividends: other rights, not being debt-claims, participating in profits*". Article 14 of *Independent personal service* may be applicable as well depending on the compensation arrangement in the partnership agreement.

(Note 2) Dividends from underlying domestic companies should be applied to Article 10 of tax treaty.

(Note 3) Capital gains from alienation of shares of underlying domestic company should be applied to Article 13 of tax treaty.

Conflict of Qualification (GP *vs.* LLP)



(Note 1) In the foreign jurisdiction where the LLP/GP is established, business incomes of LLP/GP are attributed to Taiwanese resident partners and subject to income taxes in the foreign jurisdiction (deemed PE).

(Note 2) GP is fiscally transparent from Taiwan Income Tax Act. Taiwanese resident partner should report the incomes source from the foreign jurisdiction and subject to income tax. (Foreign tax credit is applicable.)

(Note 3) LLP is fiscally **non-transparent** from Taiwan Income Tax Act. Taiwanese resident partner does not report the foreign source incomes until the earnings distributed from the foreign jurisdiction. (The foreign tax credit may **not** be applicable.)

Appendix:
Article 23-1 of Industrial Innovation Statute

Criteria for a LLP to qualify as a fiscally pass-through entity:

- LLP is newly established during the period from 1 January 2017 to 31 December 2019 and organized as a "Venture Capital Enterprise" in accordance with Article 32 of Industrial Innovation Statute.
- Total capital contribution to the LLP is accumulated to TWD 300 million (about **USD 10 million**) in 5 years.
- At least 50% of capital contribution is invested in Taiwan, and the accumulated capital invested in innovative startups accounts for at least 30% of the total capital contribution received by the LLP.
- From the accounting year of LLP been established, LLP is qualified as a fiscally transparent entity for 10 years. With a special approval from the central competent authority, the fiscally pass-through qualification of a LLP can have one-time extension for 5 years.

BEPS Actions Progress in Taiwan

BEPS No.	Actions to be taken
	Domestic Legislation
1.	**Digital Economic** VAT registration for non-resident enterprises from 1 May 2017; Deemed profits method for taxing non-resident enterprise income tax from 2 January 2018.
3.	**CFC Rule** CFC Legislation has been passed in 2016, but not yet effective.
4.	**Interest Deduction** Thin-capitalization rule has existed for years (Debt/Equity = 3:1). Need more effective anti-base erosion rules.
13.	**TP Doc and CbCR** Mater files and country-by-country Report have to be filed before 31 December 2018.

China : Andrew Choy

I. New Beneficial Owner rule for treaty benefits claim tax purpose
II. Preferential policy for dividend withholding tax deferral for re-investment

International Tax Developments

China – Updates on the Determination of Beneficial Owner

SAT Public Notice [2018] No.9 (Effective from 1 April 2018)

Amendments to unfavorable factors

- Obligation to pay 50% of the income: contractual obligation to pay and factual payment
- Further guidance on the assessment of substantive business activities

Safe harbor rule extended

- Extends the safe harbor rule with respect to dividends paid to listed companies to also include governments and individuals

Look through with certain conditions

- **Same country rule for dividends**
- **Different countries, same treaty benefit rule for dividends**

Others

- Clarification on agents and designated recipients
- Introduction of Principal Purpose Test (PPT)

International Tax Developments
China – WHT Deferral Treatment for Foreign Direct Re-investment

Cai Shui [2017] No. 88 and SAT Public Notice [2018] No. 3

(Effective retrospectively from 1 January 2017)

- **Criteria for foreign investors to enjoy WHT deferral treatment on direct re-investment**
  - Scope of direct re-investment
  - Distributed profit from equity investment (e.g. dividends)
  - Direct payment of the distributed profit to the investee company or the transferor
  - Re-investment into "encouraged projects"
- **Application procedures and responsibilities**
  - Record filing
  - Post-administration by the tax authorities
- **Settlement of the deferred WHT when the re-investment is recouped**

Japan : Shigeki Minami

I. New CFC Rules

II. Other updates

Japan : New CFC Rules

- BEPS Action 3: Designing Effective CFC Rules
- 2017 Reform: Effective for a FY of Non-Japan Subsidiaries from **April 1, 2018 – March 30, 2019**
- Mix of **Entity Approach** and **Income Approach**
  1. New Category: 30% threshold
     1. Paper Company
     2. Cash Box
     3. Black-List Company
  2. 20% or Economic Activity Standards
  3. Passive Income: Partial Inclusion

	PASSIVE INCOME		NON-PASSIVE INCOME		Effective Tax Rate
		Interest, Dividends, Royalties		Other Income	
		Without Economic Substance	With Economic Substance		
Any Company	No Inclusion to Japanese Parent				**30% or more**
Paper Company **Cash Box** **Blacklist Company**	**Entity Based Inclusion to Japanese Parent**				**Less than 30%**
A Company **Not** Satisfying **4 Economic Activities Standards**	**Entity Based Inclusion to Japanese Parent**				**Less than 20%**
A Company Satisfying **4 Economic Activities Standards**	**Income Based Inclusion to Japanese Parent**		No Inclusion to Japanese Parent		

New Categories; "Specified CFCs"

I. **Effective tax rate: Less than 30%**– Beware!

II. Three Types

1. **Paper Company**
   - I. No Fixed Place (office, store or factory); AND
   - II. No Local Control or Management
2. **Cash Box**
   - I. Passive Income / Aggregate Assets > 30%; AND
   - II. Financial income / Aggregate Assets > 50%
3. **Blacklist Company**
   - I. OECD; Only Trinidad and Tobago Non Compliant

III. Entity Based Inclusion

CFC: 4 Economic Activity Standards

I. Active Business Standard
II. Substance (Fixed Place) Standard
III. Management Control (Local Directors) Standard
IV. Either of the following Two Standards
   I. Unrelated Revenues/Cost of Goods Standard (Wholesalers, Banks)
   II. Local Business Activity Standard (Manufacturers)
      Contract Processing（来料加工）: No inclusion
      *HK Subsidiary entrusting Chinese Contract Manufacturer

➢New; Documentation and Presumptive Taxation

New Japanese CFC Rules: Takeaways

I. Check Effective Tax Rate
   - If less than **30%**, Beware!

II. Check Whether “Specified CFCs”
   - **I. Paper Company**
   - **II. Cash Box**
      - I. Check B/S and P/L Statements Carefully

III. Check Active Business Standards

IV. Check Passive Income Even if Active Business Standards Satisfied

V. Ensure Appropriate Documentation

Japan : Other Updates

I. Transfer Pricing

- Hard-to-Value Intangibles being Discussed
  - *ex post* outcomes as presumptive evidence about the appropriateness of the *ex ante* pricing arrangements

II. Earnings-Stripping-Rules

- Adjusted Income (similar to EBITDA) 50% Threshold: Potentially Decreased to 10% to 30% in line with BEPS Action 4 Report

III. Tax Treaty

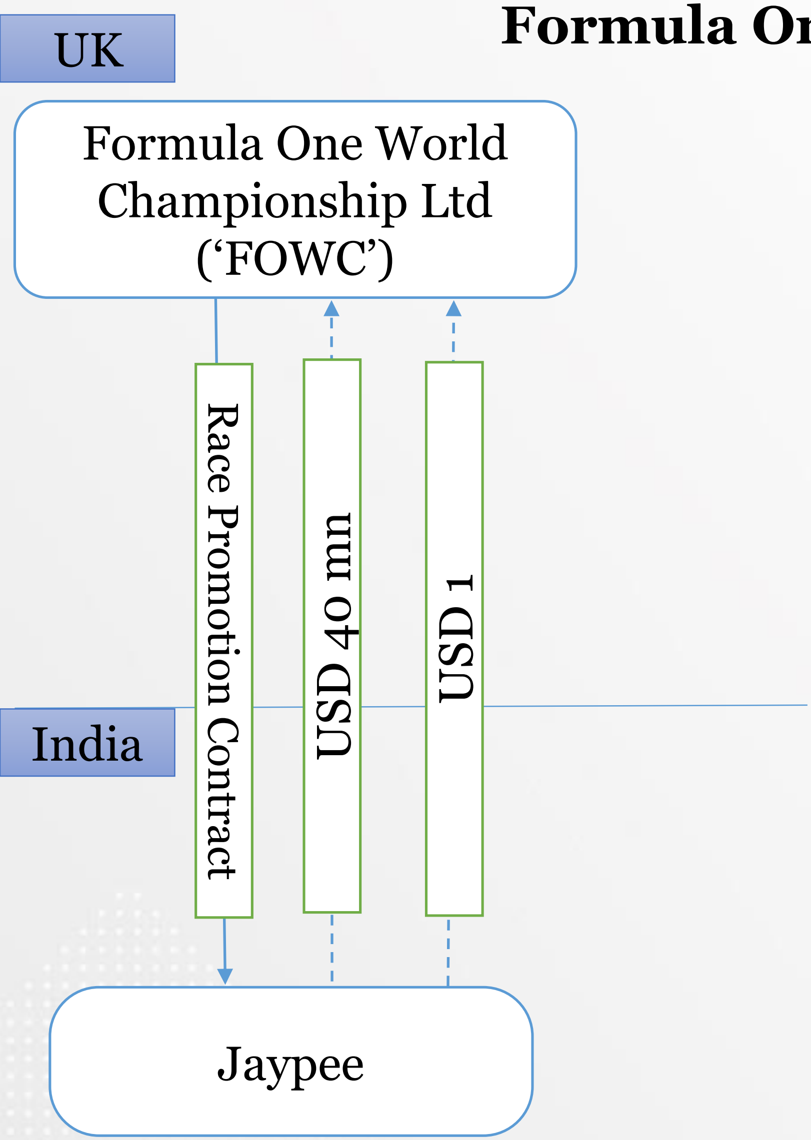
- Join Multilateral Instrument
  - Principal Purpose Test (PPT) Potentially Applicable

India : Sushil Lakhani

I. Recent Supreme Court case laws
   1. Formula One World Championship Ltd- Supreme Court
   2. E-Funds IT Solution Inc – Supreme Court
   3. A.P. Moller Maersk A S- Supreme Court

II. Important amendment to Domestic Tax Laws and new tax treaty signed

Formula One World Championship Ltd



Facts:

1. Jaypee paid an amount of USD 40 mn to FOWC under a Race Promotion Contract which gave Jaypee right to host, stage and promote the F-1 Grand Prix in India
2. It did not give Jaypee any IP right which continued to be exploited by FOWC, UK by way of telecasting , recording, broadcasting , internet and media rights

Q.1: Whether dominant control and restriction imposed over the race circuit for only **three to six weeks** triggers a fixed place PE of FOWC ? Interpretation of “ disposal test” and “Permanence”.

Q.2: Whether use of “**F1” mark** was incidental for hosting the event and payments to FOWC constitute **Royalty**?

Formula One World Championship Ltd

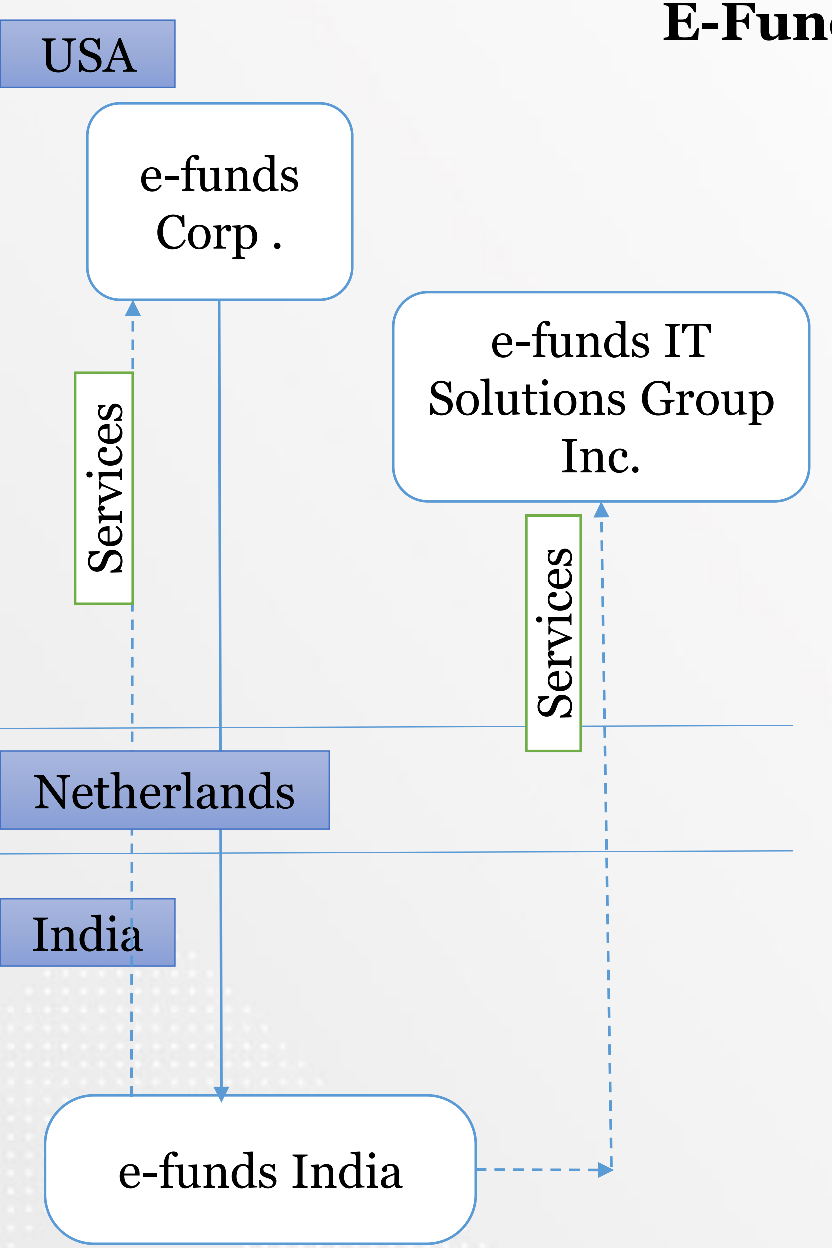
Held By Supreme Court:

A) FOWC,UK had a “fixed place” PE as:

- “Permanence” of a fixed place could be relative depending on nature of business;
- Jaypee’s capacity to act was extremely restrictive—also it was not permitted to allow access or make,store,record or transmit any recording. It had irrevocably and unconditionally assigned to FOWC,UK all copyrights and other IP Rights;
- At all material times **(i.e six weeks)** FOWC,UK had exclusive access to the racing circuit and all spaces where teams were located.

B) Payment to FOWC,UK not “Royalty” as payment was not for use of IP Rights (Para 10.1 of OECD Commentary on Art.12 relied on)

E-Funds IT Solution Inc.



Facts:

1. E-Funds Corp., USA was rendering ATM Management Services, Electronic Payment Management, Decision Support and Risk Management Services and Global Outsourcing and Professional Services to its clients outside India
2. E-funds, India provides **back office support services** to E-funds Corp., USA and E-funds IT Solutions Inc., USA
3. E-funds Corp. had seconded two of its employees to E-Funds, India

Q.1: Whether the secondment of US Company's Personnel triggered a "**Service PE**" in India as per Article 5(2)(l) of India-USA DTAA?

Q.2: What is the correct interpretation of Para 42.31 of OECD Commentary on Art.5--- for trigger of Service PE is it a pre-requisite that **US Company had Clients in India**?

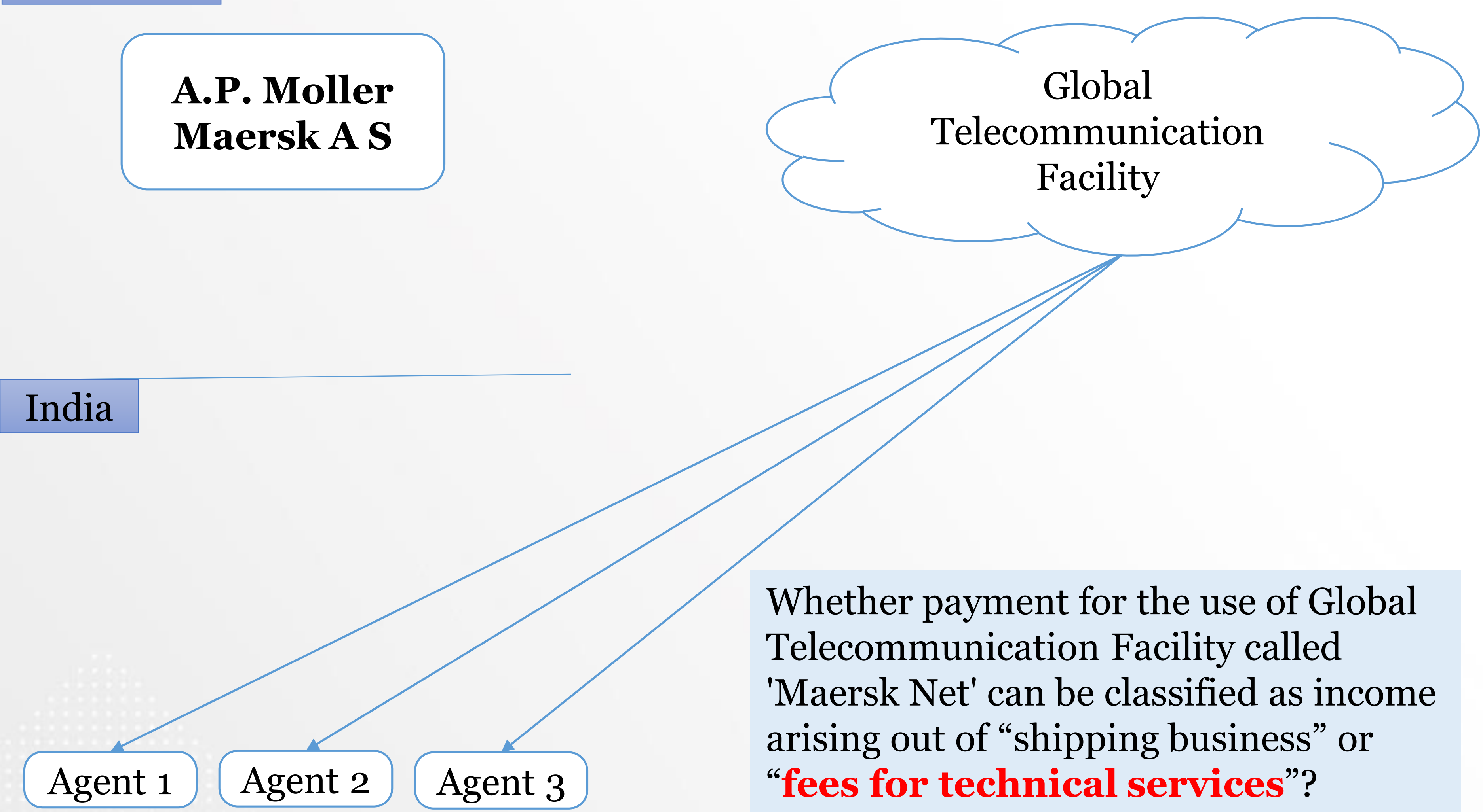
Q.3: Whether MAP arrived at in one year can be considered as a precedent for subsequent year for the same taxpayer?

E-Funds IT Solution Inc.

Held By Supreme Court :

- E-Funds USA did not have fixed place PE in India as only back office support functions carried out in India;
- E-Funds USA did not have Service PE in India as it had no clients being serviced in India---for triggering a Service PE, services should be rendered in India regardless whether services are rendered to resident or non-resident clients (Para 42.31 of OECD Commentary interpreted);
- MAP in one year cannot be binding/precedent for subsequent year (OECD Best Practices Guidance Note relied on)

A.P. Moller Maersk A S



Whether payment for the use of Global Telecommunication Facility called 'Maersk Net' can be classified as income arising out of “shipping business” or “**fees for technical services**”?

Recent Amendments in Domestic Tax Law

Sr. No.	Amendment
	Amendments To Give Effect To BEPS Reports
1.	"**Significant Economic Presence**" through digital means to trigger taxation in India; SEP to be determined based on number of users/revenue from India.
2.	The definition of "**Agency PE**" has been modified in line with BEPS/MLI recommendation.
3.	GAAR provisions effective from 1st April, 2017 (includes Treaty Override).
4.	**"Equalisation Levy**" @6% to be deducted from payments to non-resident digital companies providing online advertisement.
	Other Amendments
5.	DTAA signed with Hong-Kong
6.	Long Term Capital Gains on listed shares to be taxed @10% (previously exempted)

Thailand : Vanida Vasuwanichchanchai

Thailand Investment Incentives in the Eastern Economic Corridor (EEC)

Laws related to investment promotion

Investment Promotion Act 1977

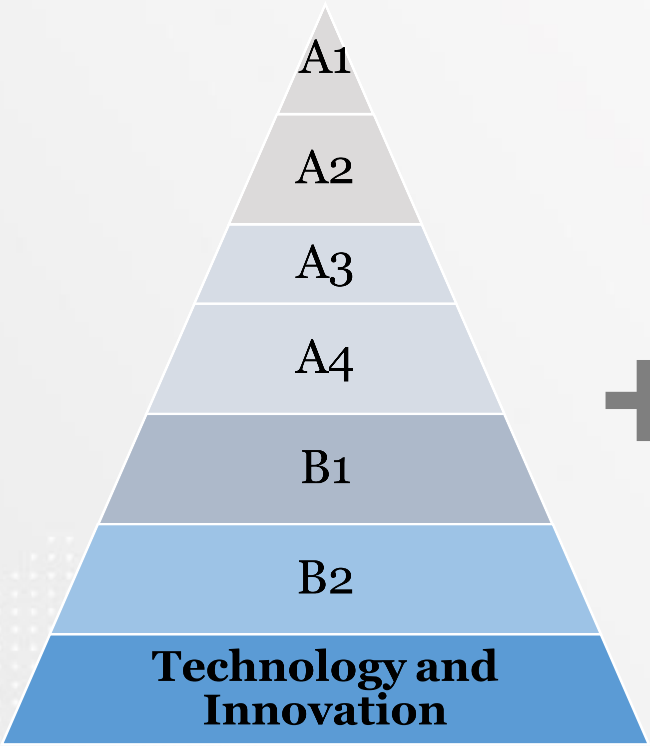
Revenue Code

Competitive Enhancement Act 2017

(Draft)
Eastern Economic Corridor Act

Investment incentives

1. Product–Based Incentives



Classified incentives based on importance of activities

2. Merit–Based Incentives

Competitiveness enhancement

6 activities

- R&D
- Technology Fund Donation
- IP Licensing Fee
- Advanced Technology Training
- Local Suppliers Development
- Product & Packaging Design

Industrial area development

- **EEC (3 provinces) –** Targeted industries
- SEZ (10 provinces)
- Southern Border (4 provinces, 4 districts)
- Industrial Estates / Zones
- Science and Technology Parks e.g. Science Parks, Food Innopolis, Space Krenovation Park

Decentralisation

- 20 provinces with lowest per capita income

Additional incentives to stimulate more investment/ expenditures that benefit the country or overall industry

Investment incentives

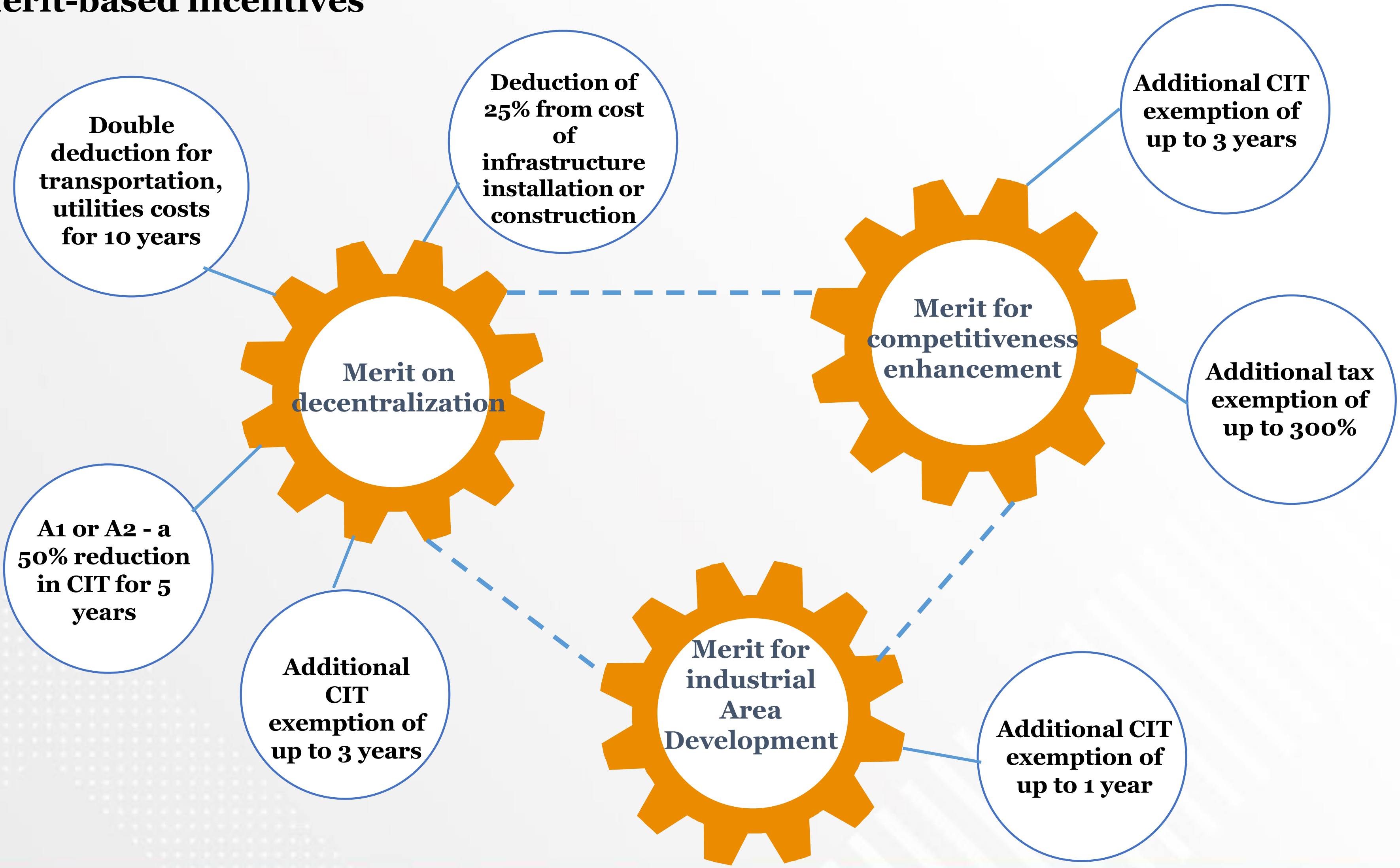
Product-based incentives

	Group	CIT exemption *
A1	**Knowledge-based** activities focusing on R&D and design to enhance the country's competitiveness	8y + Merit based incentives
A2	Activities in **infrastructure** for the country's development, activities using **advanced technology** to create value- added, with no or very few existing investments	8 y + cap + Merit based incentives
A3	**High technology** activities which are important to the country's development, with a few investments already existing in Thailand	5y + cap + Merit based incentives
A4	Activities with **lower technology** than A1-A3 **but add value to domestic resources and strengthen supply chain**	3y + cap + Merit based incentives
B1	**Supporting industry** that does not use high technology, but is still important to the value chain	Add'l incentives for competitiveness enhancement
B2		N/A
	Targeted core technology activities and activities supporting targeted technology	10y + cap + Merit based incentives up to 13y max

Note *: Import duty exemption on machinery (except for B2) and raw materials for use in production for export
Non-tax incentives: Land ownership, expat, FC outward remittance

Investment incentives

Merit-based incentives



Investment incentives in EEC

Targeted Industries in the EEC

S-Curve Industries
+
Activities Supporting S&T
+
Basic Infrastructure

116 Industries in Total

PIT at 17% for qualified workers in Promoted Zones

Promoted Zones for Specific Industries

<u>Targeted Industries:</u>
Additional 2 y of CIT exemption (could be more than 8 y) + 50% CIT reduction for 5 y

<u>Other Industries:</u>
Additional 3 y of 50% CIT reduction

Promoted Zones for Targeted Industries

<u>Targeted Industries:</u>
Additional 5 y of 50% CIT reduction

<u>Other Industries:</u>
Additional 3 y of 50% CIT reduction

Other Industrial Estates / Industrial Parks

<u>Targeted Industries in the EEC:</u>
Additional 5 y of 50% CIT reduction

Focused projects and investment plan in 5 years

Infrastructure

1. High speed rail linked 3 airports
2. Double-tracks rail linked 3 seaports
3. Highways & motorways
4. Digital infrastructure

Targeted Industries

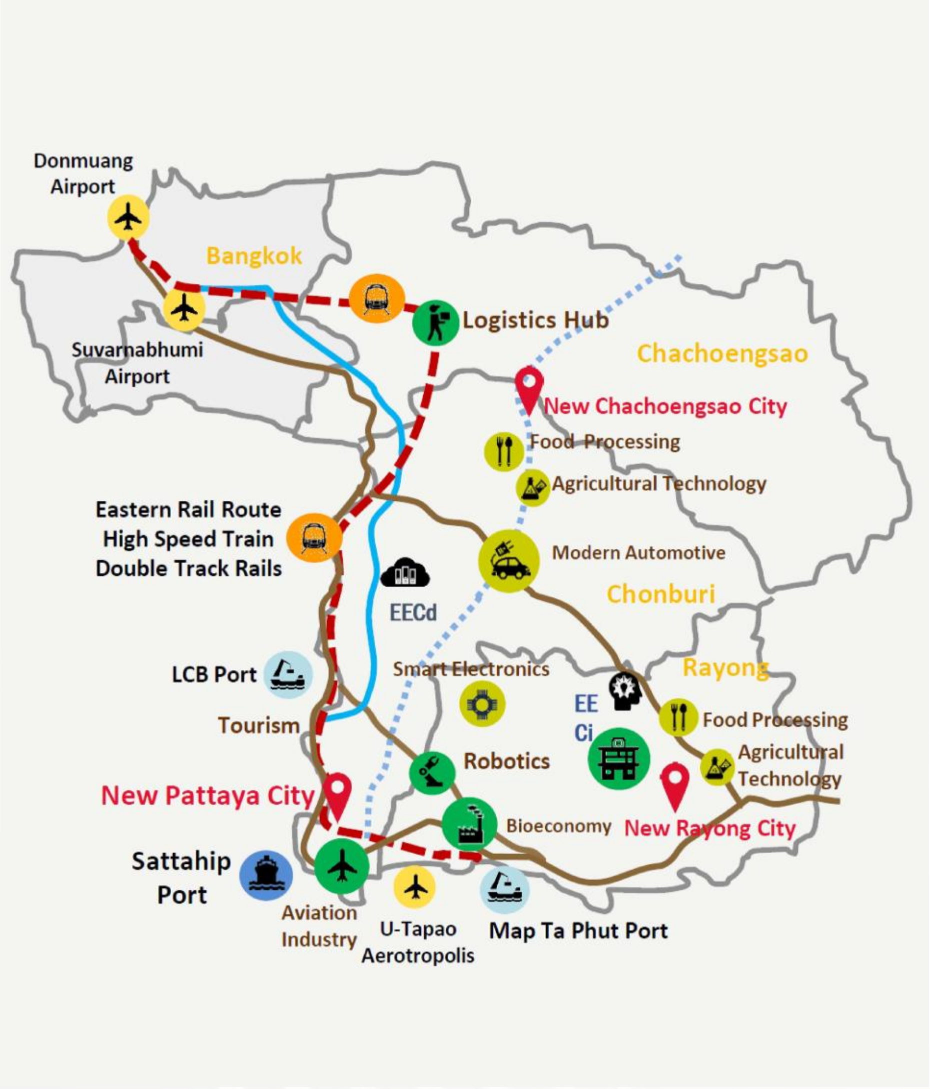
First S-Curve	**Second S-Curve**
Automobile for the future	Robotics & automations
Smart electronics	Aviation & logistics
Agriculture & bio technology	Bio energy & bio chemicals
Food for the future	Medical & health industry
World class tourism	Digital industry

Tourism

Technology & Innovation

- EEC of Innovation (EECi)
- Digital Park Thailand (EECd)

Human Resource Development & Education



Malaysia : Kok Choy Har

The key changes to the Malaysian MAP guidelines

UPDATED MAP GUIDELINES

Salient points of updated MAP guidelines:-

- Procedure for pre-filing meeting
- Submission of a formal request –notify relevant competent authorities (CA)
- Malaysia CA propose for unilateral agreement with the taxpayer
- Timeline
- - confirmation acceptance by the taxpayer prior to the agreement
- - implementation of the agreement
- Interaction between domestic appeal processes and the MAP.

UPDATED MAP GUIDELINES

INTERACTION BETWEEN MAP AND DOMESTIC APPEAL PROCESS

- The right for appeal under Income Tax Act 1967 still applies
- The taxpayer must inform the relevant branch
- No appeal shall be forwarded to the Special Commissioners of Income Tax (SCIT)
- If the taxpayer does not agree to the outcome of the MAP, the taxpayer may, request to the DG in writing to forward such appeal to the SCIT.

UPDATED MAP GUIDELINES

MAP application is not eligible for the situations below:

- for appeal cases where a SCIT/court decision has been made
- a composite assessment was raised
- for cases with elements of tax evasion or tax avoidance.

UPDATED MAP GUIDELINES

Bilateral APA(BAPA)/Multilateral APA(MAPA) APPLICATION

- A taxpayer -assessable and chargeable to tax
- Turnover value exceeding RM100 million(approx. USD 33 million)
- The value of the proposed covered transaction is
  - sales > 50% of turnover
  - purchases > 50% of total purchases
  - other transactions > RM25 million(approx. USD 8 million)
- All covered transactions must relate to income that is chargeable to tax
- Financial assistance – threshold RM 50 million (approx. USD 16 million)

UAE : Emile Bongers

I. The introduction of VAT as per 1 January 2018
II. International tax challenges for the UAE (EU black list, CFC rules, anti-abuse provisions in treaties etc)

UAE

1. VAT

- Background: lower oil prices, diversification of economy
- First step: formation of Federal Tax Authorities
- Registration of all relevant businesses by December 2017
- Mandatory for turnover > USD 100,000 and voluntary for turnover > USD 50,000
- Introduction of VAT as per 1-1-2018
- Rate is 5%
- Expected VAT collections in 2018: USD 3.3 billion
- Saudi Arabia also introduced VAT as per 2018
- Other Gulf States?

UAE

1. VAT (continued)

- VAT exemptions
- Zero rated goods and services
- Free zones
- Real estate
- VAT group
- Cross border transactions
- Cash flow and refunds?
- Invoice format
- Interest and penalties

UAE

2. International treaty developments (challenges)

- Absence of (corporate) income tax in post BEPS world
- Inclusion of anti-abuse provisions in tax treaties upon request of treaty partners
- Tax transparency and exchange of information
- Blacklisted/grey listed by the EU
- Withholding taxes on dividend/interest/royalties to low tax jurisdictions
- CFC rules could affect inbound investments into the UAE

UAE

2. International treaty developments (opportunities)

- Continuously expanding tax treaty network
- First treaty with other Gulf State in the make: Saudi Arabia
- Infrastructure and legal framework for regional headquarter functions
- Strategy: VAT and/or (corporate) income tax in post-BEPS world?

Concluding Remarks