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Beware the new definition of "group of companies"

Section 41 of the Income Tax Act ("the Act") currently defines a "group of companies" as a group, defined in section 1 of the Act and provides that any company shall not form part of a "group of companies" if, inter alia, that company is incorporated under the law of any country other than the Republic i.e. a foreign company.

For the purposes of the corporate reorganisation rules contained in Part III of the Act, the definition excluding a foreign company, will become effective from 1 January 2009. The law recognises a "group of companies" as two or more companies in which one company (referred to as the "controlling group company") directly or indirectly holds shares in at least one other company ("the controlled group company") to the extent that –

- at least 70% of the equity shares of each controlled group company are directly held by the controlling group company, one or more other controlled group companies or any combination thereof; and
- the controlling group company directly holds at least 70% of the equity shares in at least one controlled group company.

The Taxation Laws Amendment Bill (B13 – 2008), which is **still to be** promulgated into law, contains an unpleasant surprise - an amendment that sets aside the effective date of 1 January 2009 and replaces it with a new date, being 21 February 2008.

It is quite extraordinary to promulgate an effective date, only to later amend it to an earlier effective date.

The change in the effective date from 1 January 2009 to 21 February 2008 may take many taxpayers by surprise and may prejudice the tax roll-over relief, granted in terms of Part III of the Act, where such relief was dependent on the companies forming part of a "group of companies", for e.g. section 45 (intra group transactions) and section 47 (liquidation, winding up and deregistration transactions).

Beware – do not think that a foreign company will only fall outside the definition of a "group of companies" on 1 January 2009, as the Act currently provides at the time of writing. We are therefore in a strange situation, where a foreign company falls outside of the definition i.e. from 21 February 2008 but the exclusion will only become law once the Bill is promulgated.

Please contact the writer, should you require any assistance.

Ernie Lai King
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Should you have any queries arising out of the contents of this Taxmail, please contact our tax division:



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