LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

NEWSLETTER 154 - 22 April 2024

Dear Readers,

Welcome to a new edition of our newsletter.

1. Key tax judgments for the oil and gas industry published

The Myanmar Gazette editions dated 5 and 12 April 2024 published five Revenue Appellate Tribunal judgments, all dated 21 March 2023, that are important to operations in the upstream oil and gas sector.

(a) Capital gains tax assessed on farm-outs

Two judgments (English translation) concern farm-outs.

In the fiscal years 2012-2013 and 2014-2015 (hence the nowadays unaccustomed exchange rates), the main contractor (farmor) entered into agreements to allocate petroleum block operating rights ("farm-out agreements") and transferred certain operating rights and participating interests in petroleum blocks. According to the judgments, the "specified consideration" paid by the farmees consisted of the farmor's (i) costs incurred in the past in the oil and natural gas exploration and drilling operation ("past costs") and (ii) additional costs that will be incurred in the future ("carried costs"), as follows:

FY	Block	Farmee	Specified consideration	
2012-2013 FY	Block 1	Farmee A	Past costs	USD 16,563,106.29
			Carried costs	USD 9,000,000
		Farmee B	Past costs	USD 44,168,283.43
			Carried costs	USD 20,980,815
	Capital gain after tax audit			MMK 29,860,891,740 (USD 29,980,815)
	Capital gains tax after tax audit			MMK 11,944,356,696 (USD 11,992,326)
2013-2014 FY	Block 2	Farmee C	Past costs	USD 3,198,355.16
			Carried costs	USD 4,000,000
		Farmee D	Past costs	USD 3,198,355.16
			Carried costs	USD 4,000,000
	Block 3	Farmee C	Past costs	USD 7,843,712.72
			Carried costs	USD 500,000
		Farmee D	Past costs	USD 7,843,712.72

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FY	Block	Farmee	Specified consideration	
			Carried costs	USD 500,000
	Capital gain after tax audit			MMK 12,249,000,000 (USD 9,000,000)
	Capital gains tax after tax audit			MMK 4,899,600,000 (USD 3,600,000)

The capital gain is calculated by deducting the transferred asset's book value from the "full value of the sale, exchange or transfer" (Rule 5 (c) Income Tax Rules). The book value is what's left after deducting depreciation from the original costs for acquiring or creating the asset and additions to the asset, but the tax authorities and the Revenue Appellate Tribunal skipped this step (to the benefit of the main contractor) and calculated the capital gain by fully deducting the "past costs" from the total consideration.

As to the "carried costs," however, the Tribunal held that after deducting the "past costs from the total consideration for the transfer of operating rights and participating interests, the carried costs will remain from the consideration". Consequently, it considered the main contractor (farmor) to have made a capital gain in the amount of the carried costs and confirmed the tax authorities' approach of having taxed it as such, at the rate of 40% in this case.

The capital gains tax rate in the oil and gas sector is, absent taxation of alcohol and some other specific goods, by far the highest tax rate in Myanmar, so alternative structures that reduce capital gains tax tend to be good structures, even if they might create some tax exposure in other areas. The judgments are admittedly a bit scant on the facts, but we cannot help thinking that it might have been possible to lawfully structure the transaction documentation and accounting in a way that might have reduced the capital gains tax exposure risk.

The judgments are silent on whether the main contractor sought relief under a double taxation agreement.

(b) Use of exploration and other costs from abandoned blocks

The oil and gas company in this judgment (English translation) had exploration costs of USD 1,239,663 and "own costs" (presumably, expenditure not otherwise covered by the production sharing contract) of USD 1,334,535 from two blocks which it subsequently abandoned as no discovery was made of oil and gas that could be commercially

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produced. The company deducted these costs from the revenue generated from three other blocks. The tax authorities denied this deduction which resulted in an additional income tax liability of MMK 2,170,896,211.

The Revenue Appellate Tribunal sided with the tax authorities and ruled that "if these expenses […] are to be deducted from the income of [the three other blocks], this may not be done in a lump-sum deduction, but as depreciation according to the authorised period of 28 years specified in the relevant production sharing contract".

It is not apparent from the judgment whether the "authorised period of 28 years" refers to the expected life of the original two blocks that were abandoned or to the expected life of the three blocks that produce petroleum.

(c) Income tax exemption for reinvested profits

The oil and gas company in these two judgments (English translation) appealed against decisions of the tax authorities to deny the classification of income in the amount of MMK 22,357,488,551 and MMK 20,501,366,807 as tax-exempt income.

According to section 27 (b) Foreign Investment Law 2012, the Myanmar Investment Commission may grant exemptions and reliefs for profits of the business if they are maintained for re-investment in a reserve fund and reinvested therein within 1 year after the reserve is made.

The decisions concern the reinvestment in the 2014-2015 fiscal year of profits earned in the 2013-2014 fiscal year, and reinvestment in the 2015-2016 fiscal year of profits earned in the 2014-2015 fiscal year. The company had obtained approval from the Myanmar Investment Commission ("**MIC**") for the tax incentive.

Nevertheless, the tax authorities and the Revenue Appellate Tribunal denied the tax incentive because the company had kept its profits in a bank account abroad instead of a bank account in Myanmar (a "reserve fund account," as the judgments put it).

The Tribunal held that the case had to be decided according to the Foreign Investment Law 2012 (and not according to the Foreign Investment Law 1988 that was in force when the company obtained its MIC permit) as section 45 of the 2012 law prescribed that an investor under the previous law had to be deemed to be an investor under the 2012 law.

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Things may be different now for reinvestments made on or after 16 October 2016 (the day on which the Myanmar Investment Law came into force) as section 78 (a) of this law allows the Myanmar Investment Commission to exempt from income tax "profit obtained from the investment business that has obtained a permit or an endorsement [and] is reinvested in such investment business or in any similar type of investment business within one year". The new law does not specify anymore that the profit must be kept in a reserve fund.

2. Judgments on commercial tax fines

The Myanmar Gazette editions dated 5 and 16 February 2024 published four Revenue Appellate Tribunal judgments (English translation), all dated 31 March 2023, that are noteworthy for their specification of when fines are to be imposed under the Tax Administration Law and when they are to be imposed under the law that governs the relevant tax.

The tax audit of a real estate developer found that the developer had significantly underreported the number of units sold or let, as follows:

FY	Failed to report		Fine imposed under	Amount of the fine (MMK)
	Units	Revenue (MMK)		
2016-17	108 fully paid units	35,352,912,323	S. 22 (a) (2) Commercial Tax Law	875,424,810
	197 units sold on installments	20,330,905,318	S. 21 (b) Commercial Tax Law	60,992,716
	Rental revenue	1,134,011,444	S. 21 (b) Commercial Tax Law	5,670,057
2017-18	67 fully paid units	17,121,513,874	S. 22 (a) (2) Commercial Tax Law	449,671,652
	235 units sold on installments	22,484,285,569	S. 21 (b) Commercial Tax Law	
	Rental revenue	190,347,009	S. 21 (b) Commercial Tax Law	
2018-19	71 fully paid units	12,403,928,408	S. 22 (a) (2) Commercial Tax Law	438,765,875
	193 units sold on installments	18,456,436,722	S. 21 (b) Commercial Tax Law	
	Rental revenue	414,754,395	S. 22 (a) (2) Commercial Tax Law	
2019	51 fully paid units	Unspecified	S. 22 (a) (2) Commercial Tax Law	260,187,180
	125 units sold on installments	Unspecified	S. 21 (b) Commercial Tax Law	17,652,137
	Rental revenue	Unspecified	S. 22 (a) (2) Commercial Tax Law	71,195,583

Section 21 (b) Commercial Tax Law directs the tax authorities to impose a fine of 10% of the additional tax payable for failure to make monthly commercial tax advance payments or to

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furnish the quarterly or annual commercial tax return, unless there is sufficient cause to excuse the failure.

Section 22 (a) (2) Commercial Tax Law directs the tax authorities to impose a fine equal to the additional tax payable if a person having concealed facts discloses them when requested to do so to avoid prosecution for tax evasion.

The company reached an agreement with the tax authorities as to the commercial tax and was allowed to pay the additional tax assessed after the tax audit in 28 installments, out of which it had paid 7 by the time of the judgments.

It did not accept the fines and tried to have them cancelled, arguing among others that it was able to attract buyers only by offering significant discounts because it had leased the land under a build-operate-transfer (BOT) arrangement, buyers did not want to pay commercial tax, it did not know that commercial tax had to be paid at the time of the receipt of installment payments, and things got lost in translation between local and foreign accountants.

The Revenue Appellate Tribunal confirmed the fines imposed for the 2016-2017, 2017-2018 and 2018-2019 fiscal years, saying in essence that financial difficulties and ignorance were no reason for incorrect reporting.

For the 2019 fiscal year (1 April to 30 September 2019), it held that as the reporting was made in the 2019-2020 assessment year (1 October 2019 to 30 November 2020), fines could only be imposed under the new Tax Administration Law (sections 68 (b) and 74 (b)) and not under the Commercial Tax Law, and sent the case back to have the fines recalculated.

The Tax Administration Law entered into force on 1 October 2019. According to para. 7 in Public Ruling 1/2020, acts against the law shall be dealt with by applying the Tax Administration Law if such acts were committed on or after 1 October 2019.

The Revenue Appellate Tribunal furthermore held that unlike section 21 (b) Commercial Tax Law, the Tax Administration Law does not allow the taxpayer to show cause for failing to make a payment.

3. Tax incentive abolished

According to section 77 (b) Myanmar Investment Law, the Myanmar Investment Commission ("**MIC**") may grant "exemptions or reliefs from the customs duty or other internal taxes or both on the importation of the raw materials and partially manufactured goods conducted by an

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export-oriented investment business for the purposes of the manufacture of products for export".

An investor may claim this incentive "if at least 80% of the income expected to be earned from the investment is in foreign currency from exports" (rule 97 Myanmar Investment Rules).

Furthermore, MIC Notification 87/2017 allowed investors to claim this incentive if they "supply all of their finished goods and semi-finished goods manufactured locally to investment businesses which are 100% export-oriented without supplying the domestic market". However, the MIC under the State Administration Council ("**SAC**") on 5 April 2024 revoked this alternative.

The notification is silent on what happens to the incentives of existing permit or endorsement holders that were granted the exemption under Notification 87/2017.

CONVENIENCE TRANSLATION - ACCURACY NOT GUARANTEED

Government of the Republic of the Union of Myanmar
Myanmar Investment Commission
Notification No. 8/2024
1385, 12th Waning Day of Tabaung
(5 April 2024)

Revocation of Notification No. 87/2017 regarding the definition of a "100% export-oriented investment"

1. The Myanmar Investment Commission has issued this notification exercising the powers conferred by section 100 (b) Myanmar Investment Law.

2. Notification No. 87/2017 dated 20-11-2017 issued by the Myanmar Investment Commission defining a "100% export-oriented investment" is revoked.

Major General Mya Tun Oo
Chairman

4. Requirements when blending edible oil

The Myanmar Food and Drug Authority under the SAC published certain requirements that producers and distributers of blended edible oil have to comply with, as follows:

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CONVENIENCE TRANSLATION - ACCURACY NOT GUARANTEED

Republic of the Union of Myanmar
Myanmar Food and Drug Authority
Order No. 2/2024
1385, 5th Waning Day of Tabaung
(2 March 2024)

The Myanmar Food and Drug Authority has issued this order exercising its powers under section 38 (b) National Food Law for compliance when vegetable oils are, as blended oil, produced, stored, transported, distributed or sold as food.

Order determining the quality assurance and labelling when blending vegetable oils into blended oil

1. Whoever blends vegetable oils into blended oil:

   (a) May blend only two types.

   (b) Shall include at least 40% of one type of vegetable oil in the blend according to sub-para. (a).

   (c) May not add any fragrance.

   (d) May not use animal fat and crude cottonseed oil as blended oil.

2. Whoever labels pre-packaged blended oil shall comply with the provisions of the Labelling Order for Pre-Packaged Foods issued by the Myanmar Food and Drug Authority with Notification No. 8/2022 dated 20-1-2022 and with the following particulars:

   (a) The type of oil with the higher percentage shall be expressed with priority (e.g., a blend of palm oil and peanut oil with 60% palm oil shall be referred to as blended palm oil or blended palm and peanut oil. If the percentages are the same, priority may be expressed as desired.)

   (b) When displaying the name of the food type “blended oil” on the front side, the font size on a 1 litre container shall be such that the character

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"Wa" from the Burmese alphabet is at least 6 mm in size. On this basis, the display shall be adjusted according to the container size.

(c) The colour of the letters indicating the name of the food type "blended oil" on the front side shall be different from the visible background for ease of reading.

3. Action shall be taken according to section 28 (a) National Food Law against anybody producing, storing, transporting, distributing or selling sub-standard food without complying with this order.

Dr. Thet Khaing Win
Chairwoman
Myanmar Food and Drug Authority

5. Licenses for manufacturers of labelled bottled water and labelled edible oil

Furthermore, the Myanmar Food and Drug Authority under the SAC changed the license application procedure for manufacturers of labelled bottled water and labelled edible oil as follows:

CONVENIENCE TRANSLATION - ACCURACY NOT GUARANTEED

Republic of the Union of Myanmar
Myanmar Food and Drug Authority
Order No. 1/2024
1385, 9th Waning Day of Tabodwe
(4 March 2024)

The Myanmar Food and Drug Authority has issued this order exercising its powers under section 38 (b) National Food Law.

Order that manufacturers of labelled bottled water or labelled edible oil, both controlled food, must comply with according to Notification No. 524/2021

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Manufacturers of labelled bottled water or labelled edible oil, both controlled food:

(1) May make license applications to the relevant government department or organisation from the date this order is issued only after applying for a food production certificate from the Food and Drug Administration Department.

(2) Shall apply for food production certificate from the Food and Drug Administration Department no later than 1 April 2024 if they have obtained a license from the relevant government department or organisation but have not obtained a food production certificate.

(3) Regarding the submission of this certificate to the relevant government department or organisation that issued the license, license renewal, and the making of a new license, this shall be carried out according to the directives of the relevant government department or organisation.

Dr. Thet Khaing Win
Chairwoman
Myanmar Food and Drug
Authority

[Published in the Myanmar Gazette edition dated 12 April 2024.]

Government of the Republic of the Union of Myanmar
Ministry of Health
Myanmar Food and Drug Authority

1383, 9th Waning Day of Tazaungmon
(27 November 2021)

The Myanmar Food and Drug Authority, exercising its powers under section 38 (b) National Food Law, has designated the following food as controlled food according to section 6 (e) of this law:

(a) Labelled bottled water

(b) Labelled edible oil

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Dr. Thet Khaing Win
Chairwoman
Myanmar Food and Drug Authority

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Date: 27 November 2021

6. Our new office address

Due to a typo that took on a life of its own, the house number in our new office address was misrepresented in a previous newsletter and other publications. The correct address is as follows:

No. 35 (D), Inya Myaing Road, Golden Valley, Bahan Township, Yangon Region

We hope that you have found this information useful.

Sebastian Pawlita	Nyein Chan Zaw
Managing Director	Director

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About Lincoln Legal Services (Myanmar) Limited

Lincoln Legal Services (Myanmar) Limited provides the full range of legal and tax advisory and compliance work required by investors. We pride ourselves in offering result-oriented work, high dependability and a fast response time at very competitive prices. Please do not hesitate to contact us:

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