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Japan: Inbound Tax Alert

2017 Tax Reform Proposals

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On December 8, 2016, proposals for the 2017 tax reform (hereinafter the “Tax Reform”) were released by the Liberal Democratic Party and Komeito Party.

Under the Tax Reform, revisions aimed at promoting growth include amendments to the R&D tax credit regime and revisions to deductible compensation paid to directors. Further, the proposals expand the definition of certain tax qualified corporate reorganizations, including corporate divisions. While various tax rules will be established and expanded to support small and medium-sized entities (“SMEs”)[1], special tax measures for these entities are proposed to be limited in certain tax years. With regards to individual tax, proposed revisions include amendments to inheritance/gift taxes and redefining the scope of taxable income for non-permanent residents.

This alert highlights some of the key proposals that may affect foreign companies doing business in Japan or individuals residing in Japan. It should be emphasized that these proposals have not been enacted yet and could change prior to becoming law.

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1 An SME is generally defined for corporate tax purposes as a company with stated capital of JPY 100 million or less and not owned by a large company. The definition of a large company and the ownership thresholds vary depending on the applicable tax provision.

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1. Corporate Tax

(1) Revision of R&D tax credit

Following the 2016 Tax Reform, revisions are proposed for the R&D tax credit regime in an effort to increase competition. Below is an overview of the revisions related to R&D tax credits.

Item		Current	Proposed
General tax credit (Total R&D costs x base amount %)	Base amount	8～10% For SMEs, 12%	6% - 10%, depending on increase/decrease in R&D costs; up to 14% under two-year transitional measures. For SMEs, 12%; if R&D costs increase by over 5%, up to 17% will be available under two-year transitional measures.
	Credit limitation (% of corporate tax liability)	25%	25%, but the following are applicable under two-year transitional measures: For SMEs, if R&D costs increase by over 5%, an additional 10% credit will be available If R&D costs exceed 10% of average sales, an additional tax credit of 0% to 10% will be available
	Applicable scope of R&D		Expanded to include service development in-line with the "4th industrial revolution"
Applicable by election	Incremental tax credit (Total R&D costs x ratio of increase in R&D costs)	Expires 31 March 2017	Abolished
	Excess tax credit (R&D costs exceeding 10% of the average sales amount x tax credit ratio)	Expires 31 March 2017	Extended for 2 years
Base amount for special R&D (special R&D costs x base amount %)			Expansion of covered costs Increase in contract change flexibility Simplification of procedures

It should be noted that the scope of SMEs to which tax relief is applicable has also been revised (refer to Section 1(4)).

(2) Amendments to deductibility of director compensation

Under the current law, the following payments to directors are deductible unless they are determined as unreasonably excessive.

- Fixed periodical compensation
- Pre-determined/pre-notified compensation
- Profit-linked compensation
- Retirement compensation
- Stock option compensation
- Employee portion of director/employee dual role compensation

1) Profit-linked compensation

Following the trend of the 2016 Tax Reform, revisions are proposed to increase flexibility for companies to use profit-linked compensation.

An overview of the proposed measures is as follows:

Item	Current	Proposed
Scope of eligible corporations	Domestic corporation that is not a family corporation	Compensation paid by a **family corporation which has a 100% control relationship with a non-family corporation** is added to the scope of eligible corporations. The below requirements apply to the non-family corporation:

		■ Calculation method determined by compensation committee of the non-family corporation ■ Proper procedures performed at shareholders or board of directors meeting ■ Disclosure in securities report
Scope of calculation indicators	The calculation method is objective with reference to profit indicators for the relevant fiscal year (limited to profit indicators or profit adjusted with items specified in the securities report)	Scope expanded to include indicators related to: ■ **market value of shares** ■ **sales proceeds** (limited to those used together with profit indicators or market value of shares) ■ **future fiscal years or a predetermined time/period in the future** (in accordance with the above, accounting requirements will be amended)
Scope of compensation		Scope expanded to include the following: ■ Stock compensation, with number of shares granted calculated by performance-based indicators up to a pre-determined number ■ Stock option compensation, with number of options granted calculated by performance-based indicators up to a predetermined number ■ Stock option compensation, with exercisable number calculated by performance-based indicators Note: Stock options must be those where the holder is entitled to obtain shares with market value at the time of exercise.

2) Retirement compensation

Proposed revisions to retirement compensation to a director are as follows:

Item	Current	Proposed
Deductibility	Deductible unless it is unreasonably excessive	Retirement compensation calculated with reference to profit indicators (excluding compensation calculated based on service years or compensation that has already been paid) **which do not meet the conditions for deductibility of profit-linked compensation will no longer be deductible.**

3) Stock option compensation

Proposed revisions to stock option compensation to a director are as follows:

Item	Current	Proposed
Deductibility	Deductible unless it is unreasonably excessive; timing of deduction determined separately	Stock option compensation **which does not meet the conditions for deductibility of pre-determined/pre-notified director compensation or profit-linked compensation will no longer be deductible**.

4) Pre-determined/pre-notified director compensation

Scope of deductible pre-determined/pre-notified director compensation will be amended.

Item	Current	Proposed
Scope of compensation	Compensation of fixed amounts that are paid in accordance with pre-determined timing	Scope expanded to include the following: ■ Compensation of a fixed number of shares issued at a pre-determined timing ■ Stock option compensation with a fixed number of shares issued at a pre-determined timing ⇒Prior notification is not necessary for certain stock option compensation Note: Shares must have market value and stock options must be those where the holder is entitled to obtain shares with market value at the time of exercise. Shares are limited to those issued by a corporation receiving services, or by a corporation directly or indirectly holding 50% or more of the outstanding shares of the corporation receiving services.
Scope of compensation		Scope reduced to exclude the following: ■ Restricted stock compensation in which number of released shares is calculated with reference to profit indicators

5) Fixed periodical compensation

The scope of deductible fixed periodical compensation will be expanded.

Item	Current	Proposed
Scope of compensation	Periodical compensation paid at least monthly in equal installments in the relevant fiscal year, or other equivalent compensation	Scope expanded to include the following: ■ Periodical compensation that is equal after tax and social insurance contributions are deducted

6) Restricted stock compensation / stock option compensation

The scope of deductible restricted stock compensation / stock option compensation and the fiscal year of deduction will be revised as follows:

- compensation provided by a company other than the company for which services are performed will be included;
- the cost of restricted stock compensation provided in consideration for the provision of services will in principle be deductible in the fiscal year in which the lift of restriction on the transfer of relevant stocks is determined (currently, the fiscal year in which the restriction on the transfer of the relevant stocks is actually lifted); and
- compensation provided to a non-resident will be treated as if such person is a resident and services are performed on the day on which the compensation is determined.

7) Effective dates

The revisions described above will take effect as follows.

Revision	Effective date
Retirement compensation	Applicable to compensation the payment or provision of which is to be resolved (if no resolution is proposed, compensation to be paid or provided) on or after **1 October 2017**
Restricted stock compensation	
Stock option compensation	

Other compensation	Applicable to compensation the payment or provision of which is to be resolved (if no resolution is proposed, compensation to be paid or provided) on or after **1 April 2017**

(3) Revisions related to corporate reorganizations

1) Corporate divisions

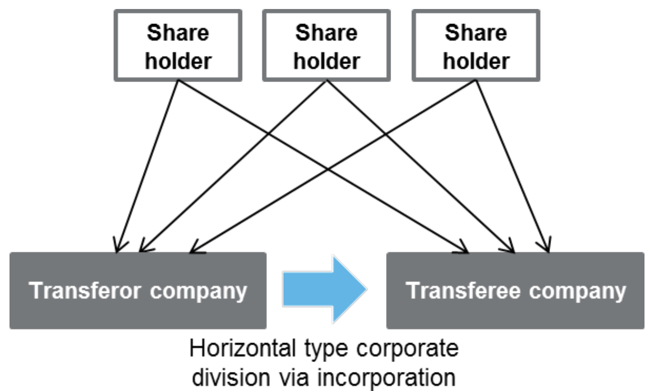
The following revisions will be made to allow the corporate division of a specific business as an independent entity in order to accelerate future-oriented business restructuring based on management strategy.

a. Expanded scope of tax-qualified Horizontal type corporate division

The definition of a tax-qualified Horizontal type corporate division will be expanded. As a result, certain Horizontal type corporate divisions via incorporation (i.e. a corporate division carried out by a corporation with two or more shareholders to spin off part of the business of the transferor company and allow the part of the business to be independently operated by a newly established company) will be included as a tax-qualified reorganization if the following requirements are met:

Qualification requirements

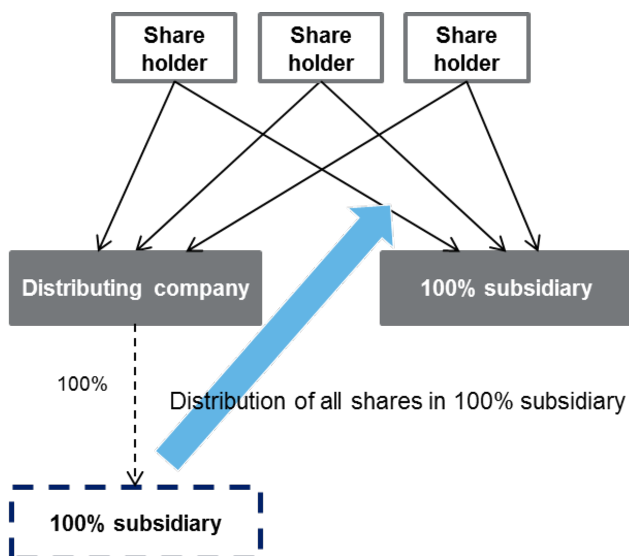
No distribution of assets other than shares	Only a number of shares of the transferee company proportional to the number of shares in the transferor company are distributed.
Controlling continuity	The transferor company is not controlled by another party before the division and the transferee company is expected to continue to not be controlled by another party.
Transfer of key assets/liabilities	The main assets and liabilities of the transferred business are transferred to the transferee company.
Employment continuity	Approximately 80% or more of the employees of the transferred business are expected to be engaged in the business of the transferee company.
Business continuity	The transferred business is expected to be continued by the transferee company.
Management continuity	Directors or important employees of the transferor company are expected to become specified directors of the transferee company.



Horizontal type corporate division via incorporation

b. Distribution of all shares in a 100% owned subsidiary

The economic effect of the distribution of all shares of a 100% subsidiary is similar to that of a Horizontal type corporate division via incorporation defined above if the 100% group relationship is deemed as a single entity. Therefore, for tax purposes such distribution in kind will be treated in the same manner as a Horizontal type corporate division via incorporation.



i. Tax treatment for shareholders of the distributing company

Distribution of all shares in a 100% subsidiary will be treated in the same manner for tax purposes as that of a Horizontal type corporate division. This will also apply for individual income tax purposes. Specifically, the following measures will be implemented:

- The shareholders of the distributing company will be considered to transfer shares of the distributing company proportional to the number of the subsidiary's shares received. If these shareholders only receive a number of the subsidiary's shares proportional to their shareholding in the distributing company, they may defer the recognition of capital gains or losses on the distributing company's shares.
- Unless all of the qualification requirements listed below are met, the value of the subsidiary's shares in excess of its capital stock and capital reserve will be treated as deemed dividends.

ii. Qualification requirements

Distribution of all shares in a 100% subsidiary will be considered as a tax-qualified corporate reorganization if all the following conditions are met:

If these conditions are all met, the distributing company will not be required to recognize capital gains/losses and withhold tax.

Qualification requirements:

No distribution of assets other than shares	Only a number of shares of the subsidiary proportional to the number of shares in the distributing company are distributed.
Controlling continuity	The distributing company is not controlled by another party before the distribution in kind and the subsidiary is expected to continue to not be controlled by another party.
Employment continuity	Approximately 80% or more of the employees of the subsidiary are expected to continue to be employed in the same business.
Business continuity	The subsidiary's main business is expected to continue after the distribution in kind.
Management continuity	At least one of the specified directors of the subsidiary continues to hold their position after the distribution in kind.

iii. Adjustments to qualification requirements for reorganizations consisting of a series of transactions

If a 100% subsidiary is established via a Vertical type corporate division or contribution in kind by a single company and it is expected that subsequently all the shares of the subsidiary are distributed, the controlling continuity test for the initial transaction (i.e. the Vertical type corporate division or contribution in kind by a single company) must be satisfied until immediately before the distribution of the shares.

c. Tax treatment for foreign corporate shareholders

The following measures will be implemented to treat foreign corporate shareholders who receive shares in the 100% subsidiary of a Japanese distributing company in the same manner as that for a Horizontal type corporate division. This will also apply for individual income tax purposes.

- The conditions in order for capital gains on certain share transfers to be taxed as Japanese source income will be revised in the case of a distribution of the subsidiary's shares.
- If the foreign shareholders of the Japanese distributing company only receive shares in a foreign subsidiary proportional to their shareholding in the Japanese distributing company, capital gains (which are taxable Japanese source income only) on the Japanese distributing company's shares will be taxed.
- However, this will not apply if a foreign corporate shareholder manages the Japanese distributing company's shares through its permanent establishment in Japan. In this case, if the foreign corporate shareholder ceases to manage the received foreign subsidiary's shares through the PE at the time of their receipt, an internal dealing is deemed to be made at that time and there will be a calculation of the income attributable to the PE.

2) Mark-to-market valuation of assets in non-qualified share-for-share exchange or at time of entry into a tax consolidated group

Assets with a book value of less than JPY 10 million will be excluded from the scope of assets subject to mark-to-market valuation in a non-qualified share-for-share exchange or at the time of entry into a tax consolidated group.

As a result, valuation of internally developed goodwill, will no longer be marked-to-market.

Item	Current	Proposed
Assets subject to mark-to-market valuation	Fixed assets, land, monetary claims, securities, and deferred assets The following are excluded:	(No revision)
	■ Assets held by a subsidiary withdrawing from a tax consolidated group within 2 months	(No revision)
	■ Assets with built-in losses of less than either JPY 10 million or 50% of capital stock and capital reserve, whichever is smaller	(No revision)
	■ Shares of a fully-controlled subsidiary under liquidation	(No revision)
		■ **Assets with a book value of less than JPY 10 million (added to the scope of excluded assets)**

3) Amortization of goodwill

Currently, goodwill acquired in the middle of a fiscal year is amortized on an annual basis (i.e. one full year of amortization may be deducted regardless of when the goodwill was acquired during the year). This will be revised and the amortization limit for the fiscal year in which the goodwill is acquired will be made on a per month basis.

This will apply to both positive and negative goodwill resulting from non-qualified reorganizations and business transfers.

(4) Limitation of scope to which SME tax relief is applicable

The following measure is proposed with the purpose of removing entities that are deemed financially stable from the scope of entities to which SME tax relief is applicable.

Various corporate tax and corporate inhabitant tax measures for SMEs will no longer be applicable to fiscal years with average annual income (i.e. average of income for the previous three fiscal years) of more than JPY 1.5 billion. This revision is not expected to apply to the exception from tax loss limitations rules available to SMEs.

This will be applicable to fiscal years beginning on or after 1 April 2019.

(5) Fundamental revision of Japan Controlled Foreign Corporation rules

The Tax Reform proposed fundamental changes to Japan Controlled Foreign Corporation rules. Further details will be issued in a subsequent newsletter.

Deloitte's view

The Tax Reform offers opportunities for growth and increased flexibility for corporate taxpayers in Japan, especially in the area of director's compensation and reorganizations. However, it also imposes certain restrictions, such as the limitations to the application of certain tax incentives for SMEs based on the size of the SMEs income.

The expanded scope of deductible compensation paid to directors is a continued positive development for attracting foreign executive talent to Japan. Nevertheless, further reforms and decreased complexity regarding the deductibility of variable compensation are necessary to bring Japan in-line with other jurisdictions competing for foreign executive talent.

The expanded definition of tax qualified reorganization is a welcomed revision which should allow more flexibility and ease the tax burden on corporate reorganizations of a non-controlled group, however, diligence is required to ensure that each condition for a tax qualified reorganization is clearly satisfied. Further, the removal of assets with a book value of JPY 10 million or less from the mark-to-market rules is another welcomed provision and should benefit taxpayers which were looking to perform a share for share exchange or enter into tax consolidation, but found the tax cost prohibitive under current rules.

Limitations on the SME incentives could have a significant impact on taxpayers which relied heavily on certain tax incentives and benefits provided to SMEs. While this revision only applies to certain SME benefits, given the government is continually searching for means to maintain tax revenue in the current tax rate reduction environment, it is possible that we may see more SME related revisions going forward.

2. Consumption Tax

(1) Virtual currency

The supply of virtual currency will be exempt from Japanese Consumption Tax ("JCT"). Currently, virtual currencies such as bitcoin do not fall under the category of exempt sales, and as a result, the sale of virtual currencies in Japan have been treated as taxable for JCT purposes. Following the enactment of the amended Fund Settlement Law in May 2016, which newly defined "virtual currency" as a means of settlement, the sale of virtual currency as defined under the new Fund Settlement Law will be exempt from JCT. This change will apply to sales/purchase transactions performed in Japan on or after 1 July 2017.

Deloitte's view

While no significant JCT revisions are proposed in the Tax Reform, it does highlight that the JCT treatment of cross-border services is one of the items that need further consideration, indicating the possibility that the place of supply for cross-border services might be changed to the place of consumption in the near future. This seems to show the government's intention to reduce potential gaps in the taxation of services supplied by foreign companies.

3 Individual Tax and Inheritance/Gift Tax

(1) Revision of scope of taxable income for non-permanent residents

Japan's BEPS reforms have led to a change in the scope of taxation for Non-Permanent Residents (NPRs). From 1 January 2017, NPRs will be taxable on worldwide income with the exception of foreign source income that is not paid or remitted to Japan. This is a subtle change to the historical position where NPRs were taxed on Japan source income and non-Japan source income only if paid or remitted to Japan.

The omission of capital gains arising from the sale of shares and securities held overseas from the definition of foreign source income had meant that gains which may previously have not been subject to Japan tax for non-permanent residents would, in cases where source country taxation was not available, have become taxable in Japan from 1 January.

To limit the impact of this change in scope of taxation, the government has confirmed that gains arising from the sale of shares and securities, with the exception of those which relate to shares or securities acquired by a non-permanent resident after 1 April 2017, can be excluded when determining taxable income for a non-permanent resident. This treatment is effective for gains on sales after 1 April 2017.

(2) Amendments to spousal deductions

Historically individuals with a spouse whose earnings were less than JPY 1.03 million have been able to claim a spouse deduction of JPY 380,000 against their taxable income. Furthermore, a special spouse deduction was available for individuals earning less than JPY 12.2 million and whose spouse earned less than JPY 1.41 million. These low cutoffs, however, have been held out as a deterrent for participation by women in the workforce as spouses limit their working hours so that the main income earner (typically the husband) does not lose entitlement to the tax deduction.

To remove this barrier, the government will increase the income cutoff for receiving a full special spouse deduction to JPY 1.5 million (or JPY 850,000 for non-employment income).

To fund the increase in availability of deductions for lower income households, the government will cap the availability of the spouse deduction for higher income earners.

From 1 Jan 2018, workers earning more than JPY 12.2 million will no longer be able to claim a dependent spouse deduction regardless of the spouse's income.

Individuals earning more than JPY 11.2 million will have a reduced spouse deduction available. Similar caps and reductions will apply for the special spouse deduction and for the equivalent deductions for local tax purposes as well.

(3) Additions to NISA system

The government will introduce a new form of the NISA (Nippon Individuals Saving Account) to run parallel to the current system.

From 1 January 2018, individuals will be able to choose to invest up to JPY 1.2 million in the existing type of account or instead up to JPY 400,000 annually into a longer term version.

Dividends and capital gains on investments held in the new long term account will be free from income tax for the period of the account (up to 20 years).

(4) Amendments related to inheritance/gift tax liability

The government will introduce a new category of taxpayer for the purposes of inheritance and gift tax.

Historically, the scope of inheritance tax has been dependent on the nationality of the heirs / donees and domicile of both the heirs / donees and decedent / donor.

Individuals who received an inheritance or gift whilst domiciled in Japan would be subject to Japanese inheritance and gift tax regardless of the location of the assets. Similarly where an individual domiciled in Japan made a gift / passed away their donees / heirs would be subject to Japanese gift and inheritance taxes again regardless of the location of the assets. It was considered that this system, which extended to foreign nationals temporarily in Japan, acted as a disincentive to attracting foreign nationals to work in the country.

From 1 April 2017, the system will be relaxed so that individuals (both donor / decedent and donees / heirs) considered temporarily living in Japan are now only subject to the Japanese gift / inheritance taxes on Japan located assets.

An individual will be considered living temporarily if they are in Japan for less than 10 out of the last 15 tax

years and living under a category of visa covered under Table 1 of the Immigration Control and Refugee Recognition Act (which includes work related visas).

The other change to the scope of taxation relates to heirs / donees who are not domiciled in Japan. Under the old system there was a 5 year look back period, whereby individuals who were Japanese nationals and domiciled in Japan within the past 5 years would remain subject to Japanese gift / inheritance taxes on a worldwide basis even after losing their domicile in Japan. This was to stop Japanese nationals temporarily moving overseas to escape Japanese gift / inheritance taxes on their overseas assets.

From 1 April 2017, the look back period for heirs / donees and decedent / donor will be extended from 5 years to 10 years. Furthermore the scope of taxation will change. Whereas previously only Japanese nationals were affected by this rule, from 1 April 2017, any heirs / donees who inherited / received from decedent / donor who was domiciled in Japan (other than individuals eligible to be considered temporarily living in Japan) in the last 10 years will now be covered. This will include foreign nationals who are not in Japan who previously would have been exempted.

Deloitte's view

The increase in the earnings threshold for claiming a spouse deduction is a welcome step in removing income tax as a barrier for women to more actively participate in the workforce. The withdrawal of the spouse deduction entirely for higher earners, however, continues the recent trend of rolling back the various income tax deductions that can be claimed by high earners and continues, from a tax perspective, to make the country less attractive in the region. For companies who bear the cost of their employee's Japan taxes for them under an expatriate arrangement it is another cost to consider as income previously covered by the tax deduction will now be taxed at the individual's marginal rate.

The limitation of exposure to income tax on capital gains on shares and securities for the non-permanent resident population is a welcome addition. However, unremitted gains realized within the period 1 January to 31 March 2017 and gains on shares acquired after 1 April 2017 by a non-permanent resident will, for the first time, fall within the scope of taxation. Companies should consider how to communicate the change in rules to their affected employees so that informed decisions can be made prior to the disposal of shares / securities. Companies may also wish to review their expatriate tax policies and revisit cost estimates for individuals who could potentially now be taxed on their share / security gains in Japan.

The introduction of the new classification of taxpayer for inheritance and gift taxes will be warmly received by the foreign business community as it effectively removes the majority of expatriates on working visas from the scope of these taxes. The expansion of the lookback period from five to ten years for individuals losing their domicile in Japan was expected, however, the fact that foreign nationals would also now be caught by the lookback rule was not. This change will have significant impact, in particular, for individuals who have worked many years in Japan but were planning to leave or retire overseas and will be of concern to many of the long term foreign residents of Japan.

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